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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 567

JACK F. LYLE,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and GULF, COLORADO AND SANTA FE RAILWAY COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Foreword	1
Decision and judgment of Court below	2
Nature of case and summary statement of matter involved	3
The pleadings	3
The facts	7
Jurisdiction of this Court	19
Questions presented	19
Reasons relied on for allowance of the Writ	22
Prayer for Writ	30
Brief in Support	31
Opinion of Court below	31
Statement of the Case	32
Specification of errors to be urged	32
Summary of argument	34
Propositions of Law	35-37

Argument:

(1) Respondents admit they are a highway of interstate commerce. The applicability of the Boiler Inspection Act is not affected by the fact that the accident and injury to petitioner occurred in the yards of respondents 38

(2) The Boiler Inspection Act is to be liberally construed in the light of its prime purpose, the protection of the employees and others by requiring the use of safe equipment 44

(3) Locomotive Number 3939, involved here, had not been withdrawn from service. At the time of the accident and injury to petitioner it was "in use" and "in service" and the Boiler Inspection Act is applicable 46

(4) The Boiler Inspection Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances 57

Summary of Argument.

I.

Respondents admit that they are a highway of interstate commerce. The applicability of the Boiler Inspection Act is not affected by the fact that the accident and injury to petitioner occurred in the yards of respondents 38-48

Petitioner brought his action under the Federal Employers' Liability Act, alleging a violation of the Federal Boiler Inspection Act, to recover damages for injuries sustained on January 10, 1946, in the yard of respondent, Gulf Company, at Gainesville, Texas, where he had been employed as hostler helper since November 1, 1945 38

After Locomotive Number 3939, owned by Atchison Company but operated into the yards of Gulf Company by employees of Gulf Company, then operated by hostler but serviced by petitioner at sand spout, water spout and oil spout, with sand, water and oil and left by hostler over inspection pit where petitioner finished his work but returned to

put in place journal box lid hook and waste bucket that were out of place, and on leaving top of tender through engine cab, stepped into grease on top step, fell and was injured.....38-48

The breadth of the Safety Appliance Act is such that it embraces all locomotives, cars and similar vehicles in use on highway of interstate commerce, irrespective of use at any particular time.....40, 41, 42

The Interstate Commerce Commission has set the standard of use and degree of safety by promulgating rule Number 153, that top of tender shall be kept free from foreign matter which would render footing insecure, such as grease, water, ice. Lilly v. Grand Trunk R. Co., 317 U.S. 481.....42, 43, 44

Jury, instructed only on Boiler Inspection Act to which respondents took no exception, could find there was a violation of the Act by reason of grease on step in question, the presence of which was unknown to petitioner, and which may not be explained away 43, 44

II.

The Boiler Inspection Act is to be liberally construed in the light of its prime purpose, the protection of the employees and others by requiring the use of safe equipment 44-46

The Boiler Inspection Act is remedial in character, makes it unlawful to use locomotive unless its boiler, tender, and all parts and appurtenances thereof are safe to operate in the service to which the same are put, that the same may be employed in the active service of the carrier without unnecessary peril to life or limb..... 45

The Boiler Inspection Act, like the Safety Appliance Acts, is to be liberally construed in the light of its prime purpose, the protection of employees and others, by requiring the use of safe equipment..... 46

III.

Locomotive Number 3939 involved here, had not been withdrawn from service. At the time of the accident and injury to petitioner it was "in use" and "in service" and the Boiler Inspection Act is applicable 46-47

The opinion of the United States Court of Appeals for the Seventh Circuit is far reaching in that it withdraws from the hostler helper and also the hostler, when engaged in servicing of locomotives in the yards of carriers, the benefit of the Safety Appliance Acts, including the Boiler Inspection Act which have heretofore been repeatedly held to apply to brakemen, inspectors and others and other yard employees of the carrier..... 47

The hostler drove locomotive from spot to spot, while petitioner serviced it with sand, water and oil. The hostler drove it to inspection pit where it was partially inspected by Matthew Jackson Hassell and petitioner finished his work..... 48

That this locomotive was "in use" and "in service" is conclusively demonstrated by Brady v. Terminal R. R. Assn., 303 U.S. 10, which cites and distinguishes New York C. and St. L. R. R. Co. v. Kelly, 70 Fed. 2d 548, 551, and other cases relied upon by United States Court of Appeals for Seventh Circuit 48, 49, 50

Confesedly, Locomotive Number 3939 was under the control of the Act of Congress and "in use" and "in service' while making its interstate journey and it was equally so in respondents' yard as it was advanced from spot to spot by the hostler while being serviced and made ready for its next trip by petitioner. Johnson v. Southern Pac. Co., 196 U.S. 1, 21, No. Car. R. R. Co. v. Zackary, 232 U.S. 248, 260 .....51, 52, 53, 54

Locomotive Number 3939 had just completed an interstate run and was being made ready for another interstate run. It was one of eight or ten locomotives serviced by petitioner during an eight hour shift. It was stopped only temporarily. The facts here clearly distinguish it from cases cited by respondents where cars have been sent to repair shops or placed upon dead tracks used for repair purposes. It was "in use" and "in service" at the time of the accident and injury to petitioner....55, 56, 57

IV.

The Federal Boiler Inspection Act (45 USCA, Sec. 23), fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances 57-61

There was evidence from which the jury could find against respondents for a violation of the Federal Boiler Inspection Act, and they did.....57, 58

Presence of grease, existence of which was unknown to petitioner, on the top step of the tender next to locomotive cab, established by the evidence, con-

stituted a violation of the Federal Boiler Inspection Act. The jury determined that such breach was at least "a contributory proximate cause" of the accident resulting in injury to petitioner while in the discharge of his duties as a hostler helper, involving "unnecessary peril to life and limb" and sufficient to permit jury to find that Federal Boiler Inspection Act had been violated.....59, 60

Case was properly submitted to jury under Federal Boiler Inspection Act, and the issues having been resolved in favor of petitioner, the judgment of the trial court should have been affirmed..... 60

TABLE OF CASES.

Baltimore & Ohio v. Groeger, 266 U.S. 521, 69 L. ed. 419, 423, 424..... 28

Brady v. Terminal R. R. Assn., 303 U.S. 10, 13, 15.....22, 25, 28, 35, 36, 37, 40, 44, 45, 49, 50, 59

Carter v. Atlanta & St. A. B. R. Co., 338 U. S. ...., 94 L. ed. 183, 186, 187 .....35, 37, 42, 44, 60

Chicago G. W. R. R. Co. v. Schendel, 267 U.S. 287, 291 .....22, 36, 50, 51, 54

Coray v. Southern Pacific Co., 335 U.S. 520, 522, 523..... 24, 25, 28, 37, 58

Davis v. Wolfe, 263 U.S. 239, 243.....24, 25, 36, 37, 46, 58, 59

Delk v. St. Louis & San Francisco R. R. Co., 220 U.S. 580, 584, 586..... 50

Erie Railroad Co. v. Collins, 253 U.S. 77, 84, 85.....35, 41

Erie R. Co. v. Russell, 2 Cir., 183 Fed. 722, 724, Cert. den. 220, U.S. 607 .....28, 35, 36, 56

Erie Railroad Co. v. Szary, 253 U.S. 86, 89, 90.....35, 41

Fort St. Union Depot Co. v. Hillen, 6 Cir., 119 Fed. 2d 307, 312, Cert. Den. 314 U.S. 642.....27, 36, 55

Great Northern Railway Co. v. Otos, 239 U.S. 349, 351 .....36, 50, 56

Johnson v. Southern Pacific Co., 196 U.S. 1, 10, 21.... ..... 22, 28, 35, 36, 37, 41, 50, 51

Lilly v. Grand Trunk R. Co., 317 U.S. 481, 485, 486.... ..... 25, 35, 36, 37, 44, 46, 59, 60

Louisville & N. R. Co. v. Botts, 8 Cir., 173 Fed. (2d) 164 .....35, 36, 41, 42

Louisville & Nashville R. R. Co. v. Layton, 243 U.S. 617, 621 .....25, 28, 35, 36, 37, 45, 58, 59

Minneapolis etc. Railway Co. v. Goneau, 269 U.S. 406, 409, 410 .....22, 28, 36, 51, 55

Moore v. C. & O. Ry. Co., 291 U.S. 205, 214.....35, 40, 41

Myers v. Reading Co., 331 U.S. 477, 482, 483..... ..... 24, 25, 36, 37, 46, 59

No. Car. R. R. Co. v. Zachary, 232 U. S. 248, 260 ..35, 37, 52

O'Donnell v. Elgin, Joliet & E. R. Co., 338 U.S. ....., 94 L. ed. 170, 172 .....35, 37 42, 44, 60

San Antonio Ry. Co. v. Wagner, 241 U.S. 476, 483..35, 41

Swinson v. Chicago, St. P. M. & O. Ry. Co., 294 U.S. 529, 531 .....36, 37, 45, 60

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33..... ..... 35, 37, 41, 56

Tipton v. A. T. & S. F. Ry. Co., 298 U.S. 141.....35, 41

Urie v. Thompson, 337 U.S. 163, 194, 195.....37, 59

Wabash R. Co. v. United States, 7 Cir., 168 Fed. 1, 3, ...35, 41

STATUTES CITED.

Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51 et seq. 38

Federal Boiler Inspection Act, 45 U.S.C., Sec. 23..38, 40, 45

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Jack F. Lyle, the above named petitioner, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, entered on the 7th day of October, 1949, in the case lately pending in the United States Court of Appeals, for the Seventh Circuit, styled Jack F. Lyle,

Plaintiff and Appellee, v. The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Gulf, Colorado and Santa Fe Railway Company, a corporation, defendants and appellants, being Number 9801 of the cause on the docket of the United States Court of Appeals for the Seventh Circuit reversing the judgment of $15,000.00 and costs of the District Court of the United States for the Northern District of Illinois, Eastern Division, in said cause, in favor of your petitioner and against the respondents, entered on the verdict of a jury which had found for petitioner and assessed his damages at the sum of $15,000.00.

On the 21st day of October, 1949, petitioner filed a petition for rehearing in the United States Court of Appeals for the Seventh Circuit (Tr. 187) which respondents answered (Tr. 207). On the 3rd day of November, 1949, petitioner's petition for rehearing was denied (Tr. 215) and said judgment of the United States Court of Appeals thereupon became final.

Decision and Judgment of the Court Below.

The final decision and judgment of the United States Court of Appeals for the Seventh Circuit is reported in 177 Fed. (2d) at page 221 and appears at pages 181-186 of the record filed herewith. In the District Court of the United States for the Northern District of Illinois, the defendants' motions for judgment in accordance with the motions for directed verdict, for judgment notwithstanding the verdict, or for a new trial (Tr. 116, 162) filed on October 1, 1948, after submission of briefs, were, on November 16, 1948, denied (Tr. 163) and respondents appealed (Tr. 164).

Nature of Case and Summary Statement of the Matter Involved.

On March 18, 1946, Petitioner, as plaintiff, brought an action at law under the Federal Employers' Liability Act (Title 45 U.S. C.A. Sec. 51 *et seq.*) charging a violation of the Boiler Inspection Act (Title 45 U.S.C.A. Sec. 23) in the District Court of the United States for the Northern District of Illinois, Eastern Division, against respondents, the defendants, The Atchinson, Topeka and Santa Fe Railway Company, a corporation, and Gulf, Colorado and Santa Fe Railway Company, a corporation, hereinafter referred to as Atchinson Company and Gulf Company respectively, engaged in interstate commerce, to recover damages for injuries sustained by him on January 10, 1946, in the yards of the respondent, Gulf Company at Gainsville, Texas, where petitioner had been emplbyed since November 1, 1945, as a hostler helper.

The Pleadings.

The original complaint was filed on March 18, 1946 (Tr. 2) and answers by both defendants on April 15, 1946 (Tr. 7, 8, 9 and 10). By stipulation filed on August 29, 1947 (Tr. 13, 14) paragraph V of Petitioner's complaint was amended as set forth in said stipulation, and subparagraph 7 was added to paragraph VI of said complaint; by stipulation subsequently filed, it was agreed that the answers of respondents to the original complaint stanl as to the complaint as amended (Tr. 12).

By paragraph III of the complaint as amended (Tr. 3) it is alleged that at the time of the occurrence petitioner was in the employ of the respondents and each of them

on their said line and system of railroad and said respondents and each of them were then engaging in the business of interstate commerce and interstate transportation as common carriers by railroad, and petitioner was then employed by respondents and each of them therein, and that the duties of his employment and the performance thereof, either in whole or in part, were in the furtherance of interstate commerce and directly, closely and substantially effected such commerce.

Paragraph V of the petitioner's complaint as amended (Tr. 14) is as follows:

> "That on or about November 1, 1945, the plaintiff entered the employ of the defendants and each of them as a hostler helper and on or about January 10, 1946, at the time of the occurrence hereinafter alleged, he was engaging in the course and scope of his employment as a hostler helper for the defendants and each of them in the yards of the defendants and each of them in Gainsville, Texas, and at said time was working on and about the Atchinson, Topeka and Santa Fe Railway Company's Engine No. 3939, which was standing over the inspection pit near the round house in the aforesaid yard of the defendants and each of them. That said engine had just completed an interstate run and was being made ready for another interstate run. That plaintiff, in the course of his employment, went to the top of the water and fuel tank of said engine to remove a journal lid hook and pail of journal waste and after completing said work, the plaintiff proceeded to leave the top of the water tank and to step on the steps provided at the end of the tank between the engine cab and the tender, and while he was descending said steps and holding on to the grab iron, he was caused to slip on oil and grease and foreign substance and to strike his elbow and fall."

By paragraph VI of petitioner's complaint it was alleged that the occurrence and resulting injuries to petitioner were directly and proximately caused by the violation by respondents and each of them of the Boiler Inspection Act of the United States; of defendants' failure to observe the rules, customs and practices then and there in force on said road and the rules, orders and regulations of the Interstate Commerce Commission; and the negligence and carelessness of respondents and each of them in that respondents and each of them used and permitted to be used on its line and system of railroad a locomotive tender which was not in proper condition and which was not safe to operate in the service to which the same was put, and respondents and each of them employed the same in their active service which caused unnecessary peril to the life and limb of petitioner (Tr. 4); that respondents and each of them, failed to keep the top of the tender of the said engine behind the fuel space clean as required by the rules of the Interstate Commerce Commission; negligently failed to maintain and provide for the petitioner, a reasonably safe place to work (Tr. 4, 5); and by added sub-paragraph 7 to paragraph VI of said complaint, that respondents negligently caused and permitted oil and grease and foreign substance to be and remain and accumulate on the steps, ladder, grab iron, parts and appurtenances of its tender and locomotive and negligently failed to make a timely and adequate inspection thereof, and to give the petitioner timely and adequate warning of the unsafe and hazardous condition thereof (Tr. 14).

The answers of both respondents (Tr. 7, 9) admitted jurisdiction of the United States District Court based upon the Employers' Liability Act of the United States.

The answers of both respondents admitted that they were duly organized and existing railroad corporations and that they were at all times mentioned, in the business of owning, maintaining and operating a line and system of railroad in interstate commerce and interstate transportation, as common carriers by railroad (Tr. 3, 7, 10). In other words the railroads of respondents were highways of interstate commerce, and the locomotive here involved was in use upon a highway of interstate commerce.

By its answer to paragraph V of the complaint as amended (Tr. 8), the respondent, Gulf Company, admitted the employment of petitioner as hostler helper; and that he was at said time working on and about Engine Number 3939, which was standing over the inspection pit near the round house in the yard of said respondent; *that said engine had just completed an interstate run and was being made ready for another run;* that petitioner in the course of his employment went on the top of the water and fuel tank of said engine, but denied the remainder of said paragraph (Tr. 8). The respondent, Atchison Company, by its answer, denied paragraph V of said complaint as amended, (Tr. 10).

On the trial it was stipulated (Tr. 144, 170) that the locomotive in question was a locomotive owned by the Atchison Company and that it had been operated into this particular place in Gainsville by employees of the Gulf Company.

At the close of the evidence (Tr. 170) counsel for petitioner stated in open court "on the proposition of negligence this cause of action is not proceeding on any theory of negligence. For the purpose of the record at

this time, it is proceeding on the theory of violation of the Boiler Inspection Act" (Tr. 170).

Counsel for petitioner further stated:

> "This action at this particular stage proceeds on two theories, so far as liability is concerned, we have proven in my judgment, a violation of the Boiler Inspection Act. In addition to that, we have shown Negligence so far as there not being a light there, when they knew one had been burned out for sufficient length of time for them to know about it" (Tr. 170).

Counsel for petitioner further stated, "This case is to be submitted by plaintiff's instructions as to both defendants based upon the violation of the so-called Boiler Inspection Act" (Tr. 170).

> "The Court: There will be no instructions on general negligence counts. I intend to give instructions as to violation of the Boiler Inspection Act." (Tr. 171).

The instructions given by the Court below to the jury were not included by respondents in the transcript of record on appeal filed in the Court of Appeals. No question on the instructions has been raised by either petitioner or respondents.

The Facts.

Petitioner, Jack F. Lyle, who entered the employ of respondent, Gulf Company, as a hostler helper, on November 1, 1945, was born on May 31st, 1908. He had farmed for several years, then worked on construction work in Cook County, Texas, was in the United States Army three years and seven months (Tr. 18). And after his discharge from the Army, and on November 1st, 1945, went to work for the respondent, Gulf Company, as a

hostler helper (Tr. 19). Prior to January 10, 1946, his health had been good. He had never been injured in any way, or confined to a hospital (Tr. 18). A day or two before he went to work, he was examined for the railroad company by a doctor at Gainsville, Texas. Prior to that time, he had never worked for a railroad company. Prior to January 10, 1946, he received $72.00 every two weeks (Tr. 19). He worked from 3:30 to 11:30 o'clock at night, seven days a week (Tr. 19, 57). During a working day he worked on as many as eight or ten engines (Tr. 20). In school, he only got about as far as the 6th grade (Tr. 43); and other than laboring work, he had no occupation (Tr. 43).

Petitioner, concerning the work of the hostler helper, (Tr. 19) said: "We had to put sand in the domes of the engine. Then we had to put in oil and water. We had to fill the lubricators, keep waste and a lot of things like that on the engine" (Tr. 19, 48). The hostler, he said, drove the engine. He is a yard engineer or a round house engineer (Tr. 19, 48). The hostler acts in the capacity of a railroad engineer, only he stays in the yard. The hostler helper does not help the hostler nor does the hostler help the hostler helper (Tr. 48).

On January 10, 1946, this particular locomotive, Engine Number 3939, which was owned by the respondent, Atchison Company, but was being operated into this particular place in Gainesville by employees of the respondent, Gulf Company (Tr. 44), came into Gainesville from a run about 8:00 o'clock P. M. It was dark at that time. A fine mist was falling and the ground was damp (Tr. 21). The exposed surface of the locomotive and tender was wet (Tr. 21).

After the engineer and fireman had left the engine, the hostler got up into the cab. Petitioner, Lyle, crawled

up on the front of the locomotive to the cat walk, holding on to a long hand rail that ran across there, to put sand in the sand dome. The hostler moved the locomotive to the sand chute where petitioner Lyle filled the sand dome on top of the locomotive (Tr. 21, 22).

It was dark. He had a flash light with him (Tr. 21, 22). The top of the tender is flat. While putting sand in the sand dome he was on the catwalk. That took five or ten minutes (Tr. 22).

He had crawled over the top of the cab of the locomotive to the tender of the engine. The hostler, at that time, was backing the locomotive south to the switch, something like 150 to 200 feet where it stopped.

Petitioner, Lyle, then crawled down the back of the tender on a form of ladder to the ground, where he threw the switch (Tr. 23). After he threw the switch the hostler backed on back further and petitioner threw the switch and the locomotive came North again on the North track to a service track (Tr. 24). As the locomotive came on North again, petitioner caught the back end and crawled up the back end of the tender on the same ladder that he went down (Tr. 24).

From that switch to where you put the water in, opposite the water spout, was around 100 feet; while running the 100 feet he was climbing up on the top of the tender and the locomotive stopped opposite the water spout (Tr. 24). Putting in the water consumed around fifteen minutes (Tr. 24).

The next move the locomotive made, after putting in the water was about 25 feet to put the oil in (Tr. 25). To put oil in the locomotive there is a top that you have to undo and throw back and you have to take a long hook

and pull a big spout around and put a big thing down into the hole that you slip up and down and make it any distance you want to. Putting the oil in the tank took around fifteen minutes (Tr. 25). He did not spill any oil that he knew of. During that time this misting or raining was continuing (Tr. 25).

After putting oil in the tank of the locomotive the hostler had to go back to this switch again, and when he got back to the switch again, petitioner had to crawl down the back of the tender to the ground where he threw the switch (Tr. 25, 26). The locomotive then backed south further and then up through the switch again. As the locomotive came forward, petitioner threw the switch and caught the back end of the tender. After petitioner had thrown the switch on the second occasion, the hostler then pulled the locomotive up to the pit (Tr. 26). The pit is the place where they generally pull inspection on the train, and leave the train, or work on it whenever they have work to do, so that they can get under it. If they possibly can, all locomotives are left there after the hostler and hostler helper finish (Tr. 26).

From the switch up to this pit track the locomotive traveled something around a couple of hundred feet (Tr. 26). At that time petitioner rode on the back end of the tender (Tr. 26). When the hostler drove the locomotive onto the pit he had completed his work and went to the roundhouse (Tr. 32), leaving petitioner alone (Tr. 32) with other work to do which took around thirty minutes (Tr. 32).

Petitioner's next job was to check the lubricators on the right side of the engine to see if they were full of oil. This he did on the ground (Tr. 26). They had a house where they kept their oil about 150 feet kind of north-

west of the train. There he got oil for the lubricators and waste for the engine (Tr. 27).

After petitioner had taken care of the lubricators and started for the roundhouse, he happened to think about seeing a waste bucket and a journal box lid hook carried on the top of the tender that were out of place (Tr. 27). He returned boarding the tender at the rear (Tr. 52), after he had put the waste bucket and the journal box lid hook where they belonged (Tr. 28) he started down from the tender through the cab (Tr. 24, 28). There were no lights and it was dark and still misting (Tr. 28). The roof of the cab of this locomotive in front of the tender extended around three or four inches over the front end of the tender (Tr. 28).

A person gets down from the top of the tender to the deck of the locomotive cab, a distance of about five feet by means of two fan shaped iron steps attached to the tender (Tr. 29). The steps from side to side would be about four or five inches wide. They stick out four or five inches from the front of the tender (Tr. 29). The depth of this step was about five inches and the width three or four; on either side of the steps there were hand rails or grab irons, about 20 inches apart, attached to the tender which extended from the top of the tender and down on the side but not all the way (Tr. 30). There was just room enough for a man to come down between them (Tr. 30).

Petitioner, facing the back of the tender, started down backwards to the engine, using the grab irons and because the roof of the cab of the locomotive extended over the tender, his body had to be bent forward (Tr. 31). Except for the dials on the locomotive, which were lit up,

there was no light (Tr. 31). He wore an Army shoe with leather soles (Tr. 31, 32).

He stepped with his right foot on the step nearest him and his foot slipped off (Tr. 31). And he fell to the floor of the cab, landing on his left elbow (Tr. 32). The distance from the first step to the deck was three or four feet. *He was alone.* After petitioner fell, and was able to get up, he looked at the step and saw a quantity of thick, heavy blackish looking grease upon it (Tr. 32, 33). He also wiped grease from his shoe on waste he had in his pocket, before he could get down. He was experiencing pain but finally got off the locomotive, went to the wash house, where he ate his supper and stayed around 25 or 30 minutes (Tr. 33). His boss, Mr. Hassell, was not there. He saw some of the boys and returned to his work. His arm pained him so that he couldn't catch hold of anything (Tr. 34). But he serviced a few more engines (Tr. 34).

On the morning of the 11th petitioner was sent to Dr. Thayer by Mr. Lemmerman at the shop (Tr. 35). Dr. Thayer rubbed a little alcohol on his elbow, put a patch over it, and sent him to the Santa Fe Hospital at Temple, Texas (Tr. 35, 36) where he saw Dr. Winston on the 12th. His arm hurt and he couldn't use it. Dr. Winston had X-rays made and the nurses put hot applications on his arm. He was confined in the hospital. Four days later, on the 16th, he was operated on by Dr. Maxwell. His arm was put in a cast and he remained in the hospital until January 22nd, when he went home (Tr. 38). He went back to Temple, Texas, on February 1st, 1946, when they took off the cast and removed the stitches (Tr. 39). He returned three more times to Temple, Texas (Tr. 40) where he was given heat treatments

but he was still unable to straighten his arm without it hurting (Tr. 41). There was limitation of motion.

On cross examination, petitioner again testified as to how the accident happened (Tr. 53), and the manner of his fall (Tr. 53, 54). He had to lay on the deck of the cab for five minutes or so after his fall before he got up, looked at the steps, and saw grease on the steps from the dials on the locomotive (Tr. 55).

He didn't remember the names of the boys at the wash house (Tr. 55, 56) and he didn't tell Hassell how the accident happened (Tr. 56, 57). Quitting time was around 11:30 (Tr. 57). Dr. Thayer gave him first aid treatment and sent him to the hospital at Temple. He did not remember Dr. Covert (Tr. 58). His last trip to Temple, Texas was on March 8th, 1946 (Tr. 59).

He identified his signatures on defendant's Exhibits Number 1 and Number 2 (Tr. 60, 61); admitted he signed Exhibit Number 2 in the presence of Mr. Wier, but did not read it (Tr. 62); that he did not ask Mr. Wier to make any corrections on the paper signed (Tr. 145); denied that he came down the iron steps facing the engine saying that it would be impossible (Tr. 63), and denied also many other statements attributed to him by Mr. Wier contained in respondents' Exhibits Numbers 2 and 2A (Tr. 62, 63, 64, 65). His education stopped at the sixth grade (Tr. 43).

On redirect examination, petitioner said that the work he was doing on that evening was part of the work that was done before an engine goes out on the run; a fire was burning in the box of the locomotive (Tr. 70). There should have been a lighted electric light on the oil crane with a large bulb that would have reflected down on the tender, so that you could see what you were doing (Tr. 70).

When he went to work on November 1, 1945, the light was out. They fixed it and it stayed two or three days (Tr. 71). It went out again and it had not been fixed thereafter. It was not lighted on the night he was injured (Tr. 71).

When he receives an order from the foreman, if there is oil on the locomotive it is his duty to clean it up (Tr. 71). On that night he did not get any order to clean up any oil or grease (Tr. 71).

He knew Mr. Lemmerman (Tr. 71). He did not prepare respondents' Exhibit Number 1 and was not in the office of the company at Gainsville on January 26, 1946. Mr. Lemmerman did not come to his house. The claim agent was out at his house on January 25th. He never saw the document dated January 26th (Tr. 72). On recross examination, admitted he knew J. M. Fleenor and that on the morning of January 11th, Mr. Fleenor filled in a form of some kind. It was not respondents' Exhibit Number 1 (Tr. 73). It was not on the form respondents' Exhibit Number 1 was on. Again, he admitted his signature. He was sure that the printing was on the form at the time he signed it. He didn't remember what the typewriting was (Tr. 74); admitted he cleaned up oil at times, but did not remember whether it was his duty (Tr. 74).

On redirect examination (Tr. 144), he testified that he was right handed, that he could write in the month of January, 1946, that he went to Mr. Lemmerman's office on the morning of January 11th, and signed some papers there; that he hadn't been back there at any time since; that he did not sign respondent's Exhibit Number 1 on January 26, 1946 (Tr. 145).

He did not tell the claim agent Wier that the hostler lived at Marietta, Oklahoma, because he did not know. The claim agent was at his house from 9:00 o'clock until 12:00 o'clock (Tr. 145). He did not tell the claim agent that on the evening of the accident there was a journal box lid lying on top of the tender (Tr. 146). On the evening he was hurt, he saw Mr. Hassell but did not talk to him. He did not tell Mr. Lemmerman when he was in his office on the day after the accident that he was coming off the tender in the wrong direction (Tr. 146). He did not tell Mr. Wier that he did not know the name of the hostler who lived in Marietta and he did not sign the leave of absence form in Mr. Lemmerman's office the day after the accident, because several months later they wanted him to sign one (Tr. 147).

Dr. Horace E. Turner (Tr. 75), called as a witness for petitioner, testified that he examined petitioner on November 14, 1947, (Tr. 77). One of the X-rays which he had taken showed a side view of the patient's left elbow joint region; the lower end of the arm bone, the humerus (Tr. 77), the radius, and also the olecranon, which is the bone that comes from the top of the elbow joint down to the little finger side of the hand and that region of the elbow, the joint surfaces of the latter or ulna bone, are not smooth and not normal. The X-ray also shows a wire in this region of the ulna, which we call the olecranon process of the ulna; that the fracture had healed so that the fracture lines were obliterated (Tr. 78).

The doctor then testified in detail as to the insertion and use of the wire to pull the fragments of the bone in close apposition and hold them that way (Tr. 78, 79). He couldn't positively tell into how many pieces the bone was fractured or broken, but suspected that there were

two fracture lines from his study of the X-ray, and what he saw there could be explanatory of the restriction of motion in the elbow (Tr. 79). There were two things: first, the head of the radius is riding higher than is normal, indicating that the head of the radius had been partially dislocated in the elbow joint. And the surface portion of the ulna is roughened because the fracture came through into that joint surface, and nature has healed it together, leaving some roughness of the joint surface (Tr. 79).

The doctor then testified that according to his diagnosis of the condition of the left arm, there was a partial limitation of motion in flexion of the left elbow joint and that he had a subluxation of the radius associated with a healed fracture of the olecranon (Tr. 80). And he was of the opinion that the movement of his arm would cause pain in the region of the elbow joint (Tr. 80). He was of the opinion that the plaintiff would have a reduced efficiency in doing any type of laborious work that required the use of his elbow (Tr. 81) and he was of the opinion also that the conditions in the left arm that he found were of a permanent nature. (Tr. 81) and in answer to a hypothetical question stated that the condition of ill being which he found had resulted from the fall on the locomotive as described in the question (Tr. 82).

Matthew Jackson Hassell (Tr. 83) for defendant, testified that on January 10, 1946, he was employed as lead machinist for the Gulf Company and worked from 3:30 in the afternoon until 11:30 at night (Tr. 83, 84) and he had charge of the boiler makers, machinists, hostlers, hostler helpers and laborers (Tr. 83). On the evening of January 10th, the plaintiff was working under his supervision (Tr. 84). He saw him in the washroom when they punched out about 11:30 and that plaintiff told him that

he had missed the step going down off the tank and bumped his elbow (Tr. 85). On cross examination he said that the conversation he had with the plaintiff was based only upon his memory (Tr. 89).

On cross examination (Tr. 89) he testified that the step petitioner fell on was not defective. It appears, however, that the step he referred to was the bottom step. His testimony with respect to the inspection of the locomotive and with respect to the step (Tr. 89, 90) is as follows:

> Mr. Hannigan: Q. You never saw this step did you? A. Yes, sir. Q. When did you see it? A. When I inspected it. Q. What steps am I referring to? A. The bottom step on the front of the tank. Q. And the bottom step on the front of the tank? A. Yes, sir. Q. *When did you inspect the engine?* A. *In the neighborhood of sometime between seven and eight o'clock.* Q. *That was before he* (Lyle) *worked on it?* A. *He was working on it at the time I was inspecting it.* Q. Were you up on it? A. Yes, sir.
>
> Mr. Stuppi: If the Court please, I believe counsel is going beyond the direct testimony.
>
> The Court: Yes, he is going beyond the scope of the direct.

He then testified that he gave a statement to Mr. Wier, respondent's general claim agent, around the 25th or 26th of January, 1946, in the Gainsville round house.

J. K. Weir (Tr. 91) for defendant testified that he was general claim agent, had been employed by the Gulf Company 27 years, and it was his duty to make investigations of accidents and settlement of claims growing out of accidents, and that he investigated the accident in which petitioner was involved on January 10, 1946 (Tr. 92). That he carried a portable typewriter and that he spent approximately two hours with Mr. and Mrs. Lyle.

He remembered making corrections on the statement (Tr. 93).

On cross examination Wier testified that one of his jobs was to settle claims (Tr. 95). And he told petitioner that he was the claim adjuster and very likely told petitioner that before he could adjust his claim he would have to know something more about it (Tr. 95). At that conference he did not discuss a settlement with him, because at that time he was not in any condition to know how badly he was hurt (Tr. 95). But all the language contained in the statement was his verbiage (Tr. 96), and what the material points were was decided by him (Tr. 97) and he admitted that there were errors in the statement (Tr. 99).

Dr. C. B. Thayer, by deposition (Tr. 100) testified that he saw petitioner about 10:00 o'clock on the morning of January 11, 1946 (Tr. 101); that petitioner told him he had missed a step on the engine, and hit his elbow on the side of the car and that he made a written report to the hospital association. Petitioner's elbow had the appearance of injury (Tr. 101) and he sent him to the hospital at Temple.

Dr. John R. Winston, by deposition (Tr. 105), testified that he was chief physician for the hospital association (Tr. 105). Petitioner's history was taken by Dr. Covert (Tr. 106); that petitioner had come under his observation during his stay at the hospital; at the time of entering the hospital he had a swollen bruised discolored left elbow and that the X-ray showed a fracture through the olecranon process of the left ulna, with considerable posterior displacement of the process, and that petitioner was operated on for an open reduction of the fracture by Dr. Maxwell Jr. on January 16 (Tr. 107). Patient re-

turned home on January 22nd (Tr. 107), reported back on February 1st, again on February 11th, and the last time on March 8, 1946 (Tr. 108).

Allison H. Lemmerman (Tr. 125) for defendant, testified that he was the general foreman of the mechanical department for the Gulf Company, knew the petitioner and identified his signature as witness on respondents' Exhibit Number 1 (Tr. 126). On cross examination, he said that he was merely questioning petitioner for his own information; that in a way, Lyle told him a different story than what was written down on Respondents' Exhibit Number 1 (Tr. 129) and said it was part of his business to find out how it happened (Tr. 129) and that he was familiar with the work of the hostler (Tr. 130).

Jurisdiction of This Court.

The judgment of the United States Court of Appeals for the Seventh Circuit, to be reviewed, was entered on the 7th day of October, 1949 (Tr. 118), and the order denying petitioner's Petition for Rehearing was entered on the 3rd day of November, 1949 (Tr. 215), at which time the judgment of the United States Court of Appeals, Seventh Circuit, became final, and the jurisdiction of this Court is invoked under Section 1254 (1) of title 28 of the United States code as enacted by the 80th Congress, Second Session, effective on September 1, 1948.

Questions Presented.

The questions presented by petitioner's petition herein, for a Writ of Certiorari are:

1. Whether, in an action against defendants engaging in the business of owning, maintaining and operating a

line and system of railroad in interstate commerce and interstate transportation, as common carriers by railroad, brought by plaintiff, employed by defendants as a hostler helper, against defendants under the Federal Employers' Liability Act, charging a violation of the Federal Boiler Inspection Act, the plaintiff may recover damages from defendants for the personal injuries sustained by him, while engaged in the servicing of one of the locomotives of defendants in the yards of defendants, resulting from the failure of defendants to comply with the requirements of the Federal Boiler Inspection Act.

2. Whether a plaintiff, employed by defendants as a hostler helper, in an action under the Federal Employers' Liability Act, charging a violation of Federal Boiler Inspection Act to recover damages for personal injuries sustained while servicing a locomotive standing over the inspection pit near the round house in the yards of the defendants, which locomotive, it is admitted, had just completed an interstate run and was being made ready for another interstate run, may recover damages for the personal injuries sustained by him, resulting from the failure of defendants to comply with the requirements of the Federal Boiler Inspection Act.

3. Whether, under the Federal Boiler Inspection Act 45 U.S.C.A. Section 23, which provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line, any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with

the provisions of Sections 28, 29, 30 and 32, and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for",

a locomotive, which has just completed an interstate run and is being made ready for another such run, and which, in the course of such preparation, has been taken over by the hostler and petitioner, the hostler helper, in the yards of respondents and moved by the hostler: first to the sand chute where petitioner spent five or ten minutes in filling the sand dome; then switched by the hostler back and forth to a point near the water spout, where petitioner spent around fifteen minutes putting water in the tender; then moved by the hostler to the oil spout where petitioner spent another fifteen minutes putting oil in the fuel tank; then switched by the hostler to the inspection pit near the round house where the hostler left and petitioner spent around thirty minutes procuring oil from a small storage house 150 feet away, checking and filling the lubricators with oil and other duties, and then started for the round house, but remembering returned to the top of the tender from the rear, to put a journal box lid hook and a waste bucket which he had overlooked in their places, and then started to leave the tender through the cab of the locomotive, slipped on grease on the top of one of the iron steps, fell and was injured, is "in use" or being "used on its line" so as to permit recovery by petitioner for the injuries sustained by him through the failure of the respondents to comply with the requirements of the Federal Boiler Inspection Act.

4. Whether the hostler and hostler helper, engaged in the yards of respondents in the servicing of a locomotive, which had just completed an interstate run and was being serviced with sand, water, oil and other incidentals and

being made ready for another interstate run, are excepted from the benefits congressionally provided by the Boiler Inspection Act, 45 U.S.C.A., Section 23.

5. Whether in this action the decision of the United States Court of Appeals for the Seventh Circuit is erroneous and in conflict with the applicable decisions of this Court, in *Brady* v. *Terminal R. R. Assn.*, 303 U.S. 10, 13; *Johnson* v. *Southern Pacific Co.*, 196 U.S. 10, 21; *Minneapolis etc. Railway Co.* v. *Goneau*, 269 U.S. 406, 409, 410; *Chicago G. W. R. R. Co.* v. *Schendel*, 267 U.S. 291 and other cases in this Court and in the United States Courts of Appeal, in that defendants' locomotive was not in bad order and had not been withdrawn from service. A comparison of these opinions of the Supreme Court, particularly *Brady* v. *Terminal R. R. Assn.*, 303 U.S. 10, 13, indicate that the United States Court of Appeals for the Seventh Circuit was wholly at sea in respect to any comprehensive understanding of the applicable decisions of this Court as related to the issues here involved.

Reasons Relied on for the Allowance of the Writ.

I.

This action was brought under the Federal Employers' Liability Act, charging a violation of the Boiler Inspection Act (45 U.S.C.A. Section 23). Jurisdiction under the Federal Employers' Liability Act, admitted by both defendants (Tr. 7, 9), was denied, based on the Boiler Inspection Act (Tr. 7, 9). Both defendants by admitting paragraph II of plaintiff's complaint (Tr. 2, 7, 10) admit that they had been and were at times mentioned in plaintiff's complaint, engaging in the business of owning, maintaining and operating a line and system of railroad in interstate commerce and interstate transportation, as

common carriers by railroad (Tr. 2, 7, 10). Defendant, Gulf Company, by its answer (Tr. 8), admitted that plaintiff, at the time of the occurrence, was engaging in the course and scope of his employment as a hostler helper for the defendant in the yards of the defendant in Gainesville, Texas, and was working on and about Engine Number 3939, which was then standing over the inspection pit near the round house in the yard of the defendant, Gulf Company; that said engine had just completed an interstate run and was being made ready for another run (Tr. 8).

On the trial, it was stipulated that this locomotive Number 3939 was owned by the Atchison Company and had been operated into this particular place in Gainesville by employees of the Gulf Company (Tr. 170).

In the course of its preparation for another run in interstate commerce this locomotive Number 3939 was taken over by the hostler and the plaintiff, the hostler helper, and operated (1) to the sand chute where the plaintiff put sand in the dome; (2) to the water spout where plaintiff put water in the tender; (3) to the oil spout where plaintiff put oil in the fuel tank; (4) to the inspection pit, where the hostler left and plaintiff checked and put oil in the lubricators and attended to other duties; and (5) started for the round house but remembered that the journal box lid hook and the waste bucket were not in their places and returned to the top of the tender from the rear thereof, put these articles in their places and started to leave the tender through the cab of the locomotive, stepped on the grease on the steps and fell and was injured.

> "Mr. Hannigan: * * * this case is to be submitted by plaintiff's instructions as to both defendants based upon the violation of the so-called Boiler Inspection Act. * * *" (Tr. 170)

"The Court: • • • There will be no instruction on general negligence counts. I intend to give instructions as to violation of the Boiler Inspection Act" (Tr. 171).

No exception was taken or objection made to the instructions to the jury, and respondents did not include them in the transcript of record on appeal to the United States Court of Appeals.

There was a failure to comply with the Boiler Inspection Act, which imposed an absolute liability in favor of the plaintiff as an employee of defendants which the jury, under instructions to which the respondents have not objected or excepted, found was the proximate cause of the injury and by which respondents are bound. *Davis* v. *Wolf*, 263 U.S. 239, 243; *Myers* v. *Reading Co.*, 331 U. S. 574, 578, 579; *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 522, 523.

Nevertheless, the United States Court of Appeals for the Seventh Circuit, though the answer of the Gulf Company (Tr. 3, 7, 8), by admitting paragraph III of plaintiff's complaint admits that it was at the time of the occurrence engaging in the business of Interstate Commerce and interstate transportation as a common carrier by railroad; that plaintiff was employed by it therein, and that the duties of his employment and the performance thereof was in the furtherance of interstate commerce and directly, closely and substantially affected such commerce, by its opinion (Tr. 183) holds:

"Clearly the use of the engine in transportation had for the time being been abandoned; its use in commerce had come to an end. Its operator had turned it over to the round house employees, the hostler had taken charge and moved it to the inspection pit at the round house and there turned

it over to the plaintiff whose duty it was to make the service and to prepare the engine for further use. If grease and oil or other foreign matter were improperly on the locomotive it was his duty to remove it if possible, and if not, to report it. It is opposed to reality to say that under such circumstances the locomotive was in use so that the mandatory duty imposed by the Boiler Inspection Act then applied. To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it. To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation."

Such ruling is erroneous and not in accord with the applicable decisions of this Court, holding that this Act favorably interpreted must be held to protect all who need protection from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances. *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 522; *Brady* v. *Terminal R. Assn.* 303 U.S. 10, 15, 16; *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 485, 486; *Davis* v. *Wolfe*, 263 U.S. 239, 243; *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U.S. ...., 94 L. ed. 170; and *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. ...., 94 L. ed. 183.

II.

The Boiler Inspection Act fairly interpreted must be held to protect all who need protection from dangerous results due to the maintenance or operation of Congressionally prohibited defective appliances. *Coray* v. *Southern Pacific Co.* 335 U.S. 520, 522; *Myers* v. *Reading* 331 U.S. 477, 482; *Louisville & N. R. Co.* v. *Layton* 243 U.S. 617, 621.

But the United States Court of Appeals for the Seventh Circuit, in holding that Locomotive Number 3939 owned by the defendant, Atchison Company, and operated by

defendant, Gulf Company, was not "in use" or "being used on its line" after it had completed an interestate run and while it was being serviced for another such run, has restricted the application of the Federal Boiler Inspection Act so as to withdraw from the hostler helper (and also the hostler) the protection, Congressionally provided, afforded to them by the Federal Boiler Inspection Act when said employees are engaged in the servicing of such locomotives in the yards of their employers. Such holding is in conflict with the law and the evidence and contravenes the applicable decisions of this Court.

III.

The decision of the United States Court of Appeals for the Seventh Circuit, holding that locomotive Number 3939, owned by the Atchison Company but being used and operated on the lines of the Gulf Company by employees of the latter company, which had just completed an interstate run and was being made ready for another interstate run by the hostler, who drove the locomotive to the sand chute where the plaintiff filled the sand dome, then to a spot near the water spout where the plaintiff filled the water tank with water, then to a place where the plaintiff filled the fuel tank with oil, then to the inspection pit near the round house where the hostler left it and the plaintiff completed the servicing of it alone, procuring lubricating oil for the lubricators from the house where such supplies were kept and waste for the journals and having finished his work, started for the round house; then happening to think of seeing a journal lid hook and a waste bucket on the top of the tender that were out of place, returned, boarded the tender from the rear, put the journal lid hook and the bucket where they belonged and, in the dark, started down from the top ot the tender through the cab of the

locomotive, stepped in thick heavy grease on the iron step, the existence of which was unknown to him and which he had not seen, slipped and fell from the top of the tender to deck of the locomotive and was injured, was not "in use" or being "used on its line", is untenable and contravenes the applicable decisions of this Court and the United States Courts of Appeal.

IV.

Locomotive Number 3939, owned by the Atchison Company and being used and operated on the line of the Gulf Company by employees of the Gulf Company, had just completed an interstate run and was being made ready for another interstate run. No repairs had been made on it. The work being done by petitioner in connection with this locomotive was "that part of the work that is done when an engine goes out on a run" (Tr. 70). It was not in the round house. It had been inspected and passed by respondent's lead machinist, Matthew Jackson Hassell (Tr. 83, 89, 90). It was not at any time withdrawn from service. The servicing of it for another interstate run had been completed. It was waiting and was, as a matter of fact, at the time of the occurrence, in use in a most real and familiar way. It was but one of some eight or ten locomotives serviced by petitioner during a working day.

The decision of the United States Court of Appeals for the Seventh Circuit in holding that this locomotive Number 3939, inspected, serviced and waiting to go out on another interstate run, was not "in use" or being "used on its line" is directly contradictory of the decisions of the United States Courts of Apeals for the Second and Sixth Circuits, in the cases of *Fort St. Union Depot Co.* v. *Hillen*, 6 Cir., 119 Fed. 2d, 307, 212, cert. denied, 314 U.S. 642,

and *Erie R. Co.* v. *Russell,* 2 Cir., 183 Fed. 722, 724, Cert. denied 220 U.S. 607; and of the decisions of this Court in *Brady* v. *Terminal R. R. Assn.,* 303 U.S. 10, 13, 15; Johnson v. *Southern Pac. Co.,* 196 U.S. 1, 21; *Chicago G. W. R. R. Co.* v. *Schendel,* 267 U.S. 287, 291; *Minneapolis etc. Railway Co.* v. *Goneau,* 269 U.S. 406, 409, 410, in all of which cases, cars which had not been withdrawn from use were held to be in use.

V.

The Boiler Inspection Act was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act. *Baltimore & Ohio* v. *Groeger,* 266 U.S. 521, 69 L. ed. 419, 424. The liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the act's violation follows from the unlawful use of the prohibited equipment "not from the position the employee may be in or the work which he may be doing at the moment when he was injured." *Brady* v. *Terminal R.R. Assn.,* 303 U.S. 10, 16; *Louisville N. R. R. Co.* v. *Layton,* 243 U.S. 617, 621; *Coray* v. *Southern Pac. Co.,* 335 U.S. 520, 523.

To hold as the United States Court of Appeals for the Seventh Circuit has held in this case viz: that a locomotive which had just completed an interstate run and was being made ready for another interstate run and was standing over the inspection pit near the round house in the yards of the carrier after the work of servicing it and the duties imposed on the employee with respect to that work had been completed and the employee on leaving the top of the tender through the locomotive cab is caused to slip and fall and is injured as a result of a violation of the Boiler Inspection Act, is not "in use" or being "used on its line" is to withdraw

from such employee, viz.: the hostler helper, and also the hostler, the benefits of the Boiler Inspection Act enacted for their safety, and intended to embrace all locomotives, cars and similar vehicles used on a railroad which is a highway of interstate commerce, contrary to the provisions of the act, and decisions of the United States Courts of Appeal and of this Court.

VI.

The United States Court of Appeal for the Seventh Circuit, by its decision and judgment in this cause, denied to petitioner in an action brought under the Federal Employers' Liability Act, charging a violation of the Federal Boiler Inspection Act, a right specifically set up and claimed by him under the Federal Boiler Inspection Act. This was not a case where a defective car had reached a place of repair as in *New York C. St. Ry. Co.* v. *Kelly,* 7 Cir., 70 Fed. 2d 548 or had been withdrawn from service. Locomotive Number 3939 involved here had not been withdrawn from use. The Act is intended to embrace all locomotives. The character of the use of this locomotive was not changed during the servicing operation in the yards of the carrier. Congress made no exception of the hostler helper or hostler employed in the servicing of a locomotive in the yards of a carrier. It is respectfully submitted that denial to the petitioner of the benefit of the verdict of the jury and the judgment thereon in this case plainly calls for the issuance by this Court of its Writ of Certiorari herein.

Prayer of Petitioner.

Wherefore, petitioner prays that a Writ of Certiorari be issued by this Court, directed to the United States Court of Appeals for the Seventh Circuit, to the end that the decision and judgment of the United States Court of Appeals for the Seventh Circuit in this cause, entitled "Jack F. Lyle, Plaintiff-Appellee, v. The Atchison, Topeka and Santa Fe Railway Co. a corporation and Gulf Colorado and Santa Fe Railway Co. a corporation, defendants-appellants, Number 9801," be reviewed by this Court as provided by law, and that upon such review said decision and judgment be reversed and the petitioner have such other relief as to this Court may seem appropriate.

Dated January 26, 1950.

Jack F. Lyle, Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

JACK F. LYLE,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, and GULF, COLORADO AND SANTA FE RAILWAY COMPANY, a corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the Seventh Circuit in said Cause Number 9801, entitled Jack F. Lyle, Plaintiff-Appellee, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Gulf Colorado and Santa Fe Railway Company, a corporation, Defendants-Appellants, which petitioner seeks to have reviewed, is reported in 177 Fed. (2d) 221 and appears on pages 181, to 185 inclusive of the record filed herewith.

Statement of the Case.

The essential facts of the case are believed to be fully stated in petitioner's petition for Writ of Certiorari and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of the argument which follows. Reference to certain facts not contained in the summary may be referred to in the argument for the purpose of aiding the court in visualizing the manifest and grievous errors of the United States Court of Appeals for the Seventh Circuit.

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Seventh Circuit in its opinion in said cause erred:

1. In reversing the judgment obtained by petitioner in the trial court entered on the verdict of the jury (Tr. 160) finding the respondents guilty and assessing the petitioner's damages in the sum of $15,000.00.

2. In finding that petitioner failed to make out a *prima facie* case in the Trial Court and that the Trial Court should have directed a verdict for the respondents and in reversing the judgment obtained by petitioner in the trial court with direction to the District Court to proceed in accordance with the announcements contained in the opinion of the Court.

3. In holding and deciding that locomotive Number 3939 involved in this case, owned by the defendant, Atchison Company, but being used by the Gulf Company, was not "in use" or being "used on its line" at the time of the accident and injury to the petitioner so as

to bring it within the purview of the Federal Boiler Inspection Act.

4. In holding and deciding that the use of said locomotive Number 3939, involved in this suit, in commerce had come to an end, and that its use in transportation had for the time being been abandoned, so that the mandatory duty of the carrier imposed by the express provision of the Boiler Inspection Act did not exist at the time of the accident and injury to the plaintiff complained of in the complaint filed in this cause.

5. In holding and deciding with respect to locomotive Number 3939 involved in this case, and the accident and injury to the petitioner that "it is opposed to realty to say that under such circumstances the locomotive was in use so that the mandatory duty imposed by the Federal Boiler Inspection Act then applied."

6. In holding and deciding, in effect, that the Federal Boiler Inspection Act does not apply with respect to injuries sustained by employees in the course of their employment in the yards of a common carrier by railroad engaged in interstate commerce and interstate transportation, when such employees of such interstate carrier are engaged in the yards of such interstate carrier, in the servicing of a locomotive which has just completed an interstate run and is being checked, oiled where oil is needed, and supplied with sand, water, fuel, waste for the journals and other incidentals so as to make it ready for another interstate run.

7. In holding and deciding that the Federal Bolier Inspection Act does not apply to the hostler helper in the yards of a common carrier by railroad engaged in interestate commerce and interstate transportation, with

respect to a locomotive of such interstate carrier standing over the inspection pit in the yards of such carrier, which has just completed an interstate run and is being made ready for another interstate run and the hostler helper in the course of his employment, goes to the top of the tender of such locomotive to remove a journal lid hook and a pail of journal waste and in leaving the top of such tender through the cab of such locomotive is caused to fall on oil and grease and foreign substance on steps of such tender and is injured.

8. In holding and deciding that the Federal Boiler Inspection Act does not apply with respect to the personal injuries incurred by a hostler helper employed in the yards of a common carrier by railroad engaged in interstate commerce and interstate transportation when such hostler helper is engaged in the servicing of a locomotive standing over the inspection pit in the yard of such carrier, which has just completed an interstate run and is being made ready for another interstate run and such employee is injured in the course of his work in servicing said locomotive so standing over the inspection pit in the yards of such common carrier by railroad.

Summary of Argument.

Summary of argument in this brief follows the subject index preceding Petition for Writ of Certiorari.

PROPOSITIONS OF LAW.

I.

Respondents admit that they are a highway of interstate commerce. The applicability of the Boiler Inspection Act is not affected by the fact that the accident and injury to petitioner occurred in the yards of respondents.

Brady v. *Terminal R.R. Assn.*, 303 U.S. 10, 15

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33

Tipton v. *A. T. & S. F. Ry.*, 298 U.S. 141

Johnson v. *Southern Pac. Co.*, 196 U.S. 1, 21.

Erie R. Co. v. *Russell*, 2 Cir., 183 Fed. 722, 725, Cert. den., 220 U.S. 607

Wabash R. Co. v. *United States*, 7 Cir. 168 Fed. 1, 3

Lilly v. *Grand Trunk R. Co.*, 317 U.S. 481, 485

Louisville & N. R. Co. v. *Botts*, 8 Cir. 173 Fed. (2d) 164, 166, 167

No. Carolina R. R. Co. v. *Zachary*, 232 U.S. 248, 260

San Antonio Ry. Co. v. *Wagner*, 241 U.S. 476, 483

Moore v. *C. & O. Ry. Co.*, 291 U.S. 205, 214

Erie Railroad Co. v. *Szary*, 253 U.S. 86, 89, 90

Erie Railroad Co. v. *Collins*, 253 U.S. 77, 84, 85

O'Donnell v. *Elgin, Joliet & E. R. Co.*, 338 U.S. ...., 94 L. ed. 170, 172.

Carter v. *Atlanta & St. A. B. R. Co.*, 338 U.S. ...., 94 L. ed. 183, 186, 187

II.

The Boiler Inspection Act is to be liberally construed in the light of its prime purpose, the protection of the employees and others by requiring the use of safe equipment.

Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481, 485
Johnson v. *Southern Pac. Co.*, 196 U.S. 1, 17-19
Myers v. *Reading Co.*, 331 U.S. 477, 482, 483
Brady v. *Terminal R.R. Assn.*, 303 U.S. 10, 15
Swinson v. *Chicago St. P. M. & O. Ry. Co.*, 294 U.S. 529, 531
Davis v. *Wolfe*, 263 U.S. 239, 243
Louisville & Nashville R. R. Co. v. *Layton*, 243 U.S. 617 621
Louisville & N. R. Co. v. *Botts*, 8 Cir. 173 Fed. (2d) 164

III.

Locomotive number 3939, involved here, had not been withdrawn from use. At the time of the accident and injury to plaintiff it was "in use" and "in service" and the Boiler Inspection Act is applicable.

Brady v. *Terminal R.R. Assn.*, 303 U.S. 10, 13
Erie R. Co. v. *Russell*, 2 Cir. 183 Fed. 722, 724 Cert. den. 220 U.S. 607
Johnson v. *Southern Pacific Co.*, 196 U.S. 1, 21, 22
Delk v. *St. Louis & San Francisco R. Co.*, 220 U.S. 584, 586
Chicago G. W. R. Co. v. *Schendel*, 267 U.S. 287; 69 L. ed. 614
Minneapolis, etc., Ry. Co. v. *Goneau*, 269 U.S. 406, 410, 70 L. ed. 335, 339
Fort Street Union Depot Co. v. *Hillen*, 6 Cir., 119 Fed. (2d) 207, 212, Cert. den. 314 U.S. 642

Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33

North Carolina R.R. Co. v. *Zachary,* 232 U.S. 248

Great Nor. Ry. Co. v. *Otos,* 239 U.S. 349, 351

IV.

The Boiler Inspection Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of Congressionally prohibited defective appliances.

Coray v. *Southern Pac. Co.,* 335 U.S. 520, 522

Brady v. *Terminal R. R. Assn.,* 303 U.S. 10, 15, 16

Louisville & N. R. Co. v. *Layton* 243 U.S. 617, 621

Swinson v. *Chicago, St. P. M. & O. Ry. Co.,* 294 U.S. 529, 531

Davis v. *Wolfe,* 263, U.S. 239, 243

Johnson v. *Southern Pac. Co.,* 196, U.S. 1, 17-19

Lilly v. *Grand Trunk R. Co.,* 317 U.S. 481, 485, 486

Myers v. *Reading,* 331 U.S. 477, 482

Urie v. *Thompson,* 337 U.S. 163, 194, 195

O'Donnell v. *Elgin, Joliet & E. R. Co.,* 338 U.S. ....., 94 L. ed. 170, 172

Carter v. *Atlanta & St. A. B. R. Co.,* 338 U.S. ....., 94 L. ed. 183, 186, 187, 188

ARGUMENT.

I.

Respondents admit that they are a highway of interstate commerce. The applicability of the Boiler Inspection Act is not affected by the fact that the accident and injury to petitioner occurred in the yards of respondents.

Petitioner, Jack F. Lyle, as plaintiff, brought an action at law in the District Court of the United States for the Northern District of Illinois, Eastern Division, under the Federal Employers' Liability Act (Title 45 U.S.C.A. Sec. 51 *et Seq.*) charging a violation of the Boiler Inspection Act (Title 45 U.S.C.A. Sec. 23) against respondents, The Atchison, Topeka and Santa Fe Railway Company, a corporation, and Gulf Colorado and Santa Fe Railway Company, a corporation, hereinafter referred to as Atchison Company and Gulf Company, to recover damages for injuries sustained by him on January 10th, 1946, in the yard of respondent, Gulf Company, where the was employed as a hostler helper.

Petitioner entered the employ of respondent Gulf Company on November 1, 1945. It was his duty as a hostler helper, while the hostler drove, to put sand in the dome of the engine, to put in oil and water, to fill the lubricators, keep waste and a lot of things like that on the engine (Tr. 19, 48). From the time he went to work on November 1, 1945, to the time of his injury, on January 10, 1946, he worked from 3:30 in the afternoon, until 11:30 o'clock at night, seven days a week (Tr. 19) and during a working day, he worked on as many as eight or ten engines (Tr. 20).

Respondents admitted Paragraph II of petitioner's complaint (Tr. 7, 10) which alleged (Tr. 2).

> "That the defendants and each of them are duly organized and existing as railroad corporations, and that at all the times herein mentioned have been and now are engaged in the business of maintaining and operating a line and system of railroad in interstate commerce and interstate transportation as common carriers by railroad."

The Gulf Company, by its answer to paragraph III of petitioner's complaint, (Tr. 7) admitted the employment of petitioner and that it was then engaging in the business of interstate commerce and interstate transportation as a common carrier by railroad and that the duties of the employment of petitioner and the performance thereof, either in whole or in part, was in the furtherance of interstate commerce, and directly, closely and substantially affected such commerce. The Atchison Company, by its Answer to Paragraph III admitted it was then engaged in the business of interstate commerce and transportation as a common carrier by railroad, but was without information sufficient to form a belief that the duties of petitioner's employment and the performance thereof in whole or in part were in the furtherance of interstate commerce and directly, closely and substantially affected such commerce (Tr. 10). On the trial it was stipulated (Tr. 144, 170) that locomotive Number 3939 involved here was owned by the respondent, Atchison Company and had been operated into this particular place in Gainsville by employees of the respondent, Gulf Company.

By its answer to Paragraph V, of petitioner's complaint, the respondent, Gulf Company, admitted that locomotive Number 3939 of the Atchison Company which at the time of the occurrence was standing over the

inspection pit in the yard of said respondent, had just completed an interstate run and was being made ready for another interstate run (Tr. 8, 14). The respondent, Atchison Company, denied this paragraph of petitioner's complaint (Tr. 10).

By the Boiler Inspection Act (45 U.S.C.A. Section 23) it is provided:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in active service by such carrier without unnecessary peril to life or limb * * *."

In *Brady* v. *Terminal R.R. Assn.*, 303 U.S. 10, Brady, a car inspector, injured while inspecting a string of cars at Granite City, Illinois, sued the Wabash under the provisions of the Safety Appliance Act which provided:

> "It shall be unlawful for any common carrier subject to the provisions of this Act, to have or permit to be hauled or used on its line, any car subject to the provisions of this Act not equipped with appliances provided in the Act * * *."

The Court, page 15, said:

> "The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway for interstate commerce, and is not confined exclusively to vehicles engaged in such commerce."

It is beyond dispute that the Safety Appliance Acts, which would include the Boiler Inspection Act, apply to cars and to locomotives in use on a highway of interstate commerce regardless of the type of commerce and ir-

respective of the use made of any particular car or of any locomotive at any particular time. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33, 41; *Moore* v. *C. & O. Railway Co.,* 291 U.S. 205, 214; *Tipton* v. *A. T. & S. F. Ry. Co.,* 298 U.S. 141; *Wabash R. Co.* v. *United States,* 7 Cir. 168 Fed. 1, 3; *Erie Railroad Co.* v. *Szary,* 253 U.S. 86, 89, 90; *Erie Railroad* v. *Collins,* 253 U.S. 77, 84, 85; *San Antonio Ry. Co.* v. *Wagner,* 241 U.S. 476, 483.

See also *Johnson* v. *Southern Pacific Co.,* 196 U.S. 1, where plaintiff was injured as a result of failure of defendant to equip its cars engaged in interstate commerce with automatic couplers, where the Court on the question of whether or not the car in question was engaged in interstate commerce, at page 22 said:

> "Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

And note the language in *Erie Co.* v. *Russell,* 183 Fed. 722, (Cert. den. 220 U.S. 607) where the Court held that the fact that the accident occurred during switching operations and not during its regular western or eastern movement of the freight train does not affect the operation of the statute, and, at page 725, said:

> "Certainly if the car came into Port Jervis in the afternoon in an interstate run, and moved out of Port Jervis the next morning on another interstate run, the character of its use was not changed during the switching operations at night."

A recent case holding that the Boiler Inspection Act applies to a locomotive in the railroad yards as well as to one out on the main line is *Louisville & N. R. Co.* v. *Botts,* 8 Cir. 173 Fed. (2d) 164 where the plaintiff Botts lost a

leg when he slipped off a footboard of a moving switch engine in defendant's Radnor yards outside of Nashville, Tenn. See also *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U.S. ....., 94 L. ed. 170, 172, and *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S....., 94 L. ed. 183, 186, both involving violations of the Federal Employers' Liability Act and Safety Appliance Acts in switching operations in yards of defendants, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the Federal Employers' Liability Act.

Apposite also as to the facts in this case, and to the applicability of the Boiler Inspection Act at the time of the accident and injury to petitioner is *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, where the plaintiff, a brakeman, brought an action in an Illinois State Court under the Federal Employers' Liability Act and the Boiler Inspection Act for injuries sustained on February 6th, 1937, in the course of his employment as a brakeman in interstate commerce. There the plaintiff fell from the top of a locomotive tender while pulling a water spout, which was at the side of the track over the tender's manhole by means of a rod and hook, preparatory to filling the tender's tank with water. There the Court at page 486 said:

> "The use of a tender, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. Fortunately, we are not left wholly to our own resources in construing the Act in the light of its humanitarian purpose. The Interstate Commerce Commission has set the standard here by promulgating a rule (No. 153) that the 'Top of tender behind fuel space shall be kept clean, and means provided

to carry off waste water. From the phrasing of Rule 153 we think it aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure, for example, coal, dust, debris, grease, waste, water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand. In using the word "clean," the Commission must have meant something more than mere manner of construction or mechanical operation, because "clean" does not naturally lend itself to such a limited connotation. That something more is the continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous.'

"From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechancial defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate * * * without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation."

The Court there found that the jury had a right to find a violation of the Boiler Inspection Act by reason of the presence of ice on the top of the tender.

In this case, the jury was instructed only on the Boiler Inspection Act (Tr. 171). There were no instructions on general negligence (Tr. 171). Respondents took no exception to the charge to the jury and the jury found a violation of the Act by reason of the grease on the top step at the front end of the tender of which petitioner had no knowledge and by reason of which he fell to the floor of the engine cab and was injured. Locomotive No. 3939 was in use upon a railroad which was a highway of interstate commerce. This locomotive had just completed an interstate run and was being made ready for another interstate run. Negligence is not the basis of liability under the Act. Instead the Act imposed upon the carrier an absolute and continuing duty to maintain the locomotive and all its parts and appurtenances thereof in proper condition and safe to operate. • • • without unnecessary peril to life or limb. *Brady* v. *Terminal R. Assn.*, 303 U.S. 10; *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 486. See also *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. ....., 94 L. ed. 183, 187, and *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U. S. ....., 94 L. ed. 170 172.

II.

The Boiler Inspection Act is to be liberally construed in the light of its prime purpose, the protection of the employees and others by requiring the use of safe equipment.

In this case, after the locomotive had been moved to the inspection pit and petitioner had completed his work he recalled seeing a bucket for journal waste and a journal box lid hook carried on top of the tender that were out of place (Tr. 27). He returned, boarding the tender at the rear (Tr. 52), and after he had put the

waste bucket and the journal box lid hook where they belonged (Tr. 28) he started down from the tender through the cab of the locomotive (Tr. 24, 28). There were no lights and it was dark and still misting (Tr. 28). He stepped with his right foot on the top step nearest him, and his foot slipped off (Tr. 31). And he fell to the floor of the cab landing on his left elbow and was injured.

The Boiler Inspection Act (45 U.S.C.A. Sec. 23) makes it unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which they are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.

The language of the Safety Appliance Acts and the Boiler Inspection Act make it clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use a locomotive unless its boiler, tender and all parts and appurtenances thereof are safe to operate in the service to which the same are put, that the same may be employed in the active service of the carrier without unnecessary peril to life or limb. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of the injury to them when engaged in the discharge of duty. It is conceded that petitioner, Lyle, up to the time that he stepped on this step covered with grease and fell and was injured was engaged in the discharge of his duties as a hostler helper. The jury found that the pe-

titioner's case came within the interpretation of the statute and the judgment entered on the verdict of the jury should be affirmed. *Louisville & Nashville R. Co.* v. *Layton*, 243 U.S. 617, 621.

The statute has been liberally construed "so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with the requirement of the Act." *Swinson* v. *Chicago St. P. M. & O. Ry. Co.*, 294 U.S. 529, 531; *Brady* v. *Terminal R. R. Assn.*, 303 U.S. 10, 15.

The Boiler Inspection Act insofar as it aims to protect the lives and limbs of men is remedial in its character and should be so construed as to prevent the mischief and advance the remedy. See *Johnson* v. *Southern Pac. Co.*, 196 U.S. 1, 17, 18.

The Boiler Inspection Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 485. See also *Myers v. Reading Co.*, 331 U.S. 477; *Davis v. Wolfe*, 263 U. S. 239, 243.

III.

Locomotive Number 3939, involved here, had not been withdrawn from service. At the time of the accident and injury to petitioner it was "in use" and "in service" and the Boiler Inspection Act is applicable.

To this proposition the Court of Appeals for the Seventh Circuit (Tr. 183, 184) has erroneously given a negative answer that is far reaching. It withdraws from the hostler, as well as the hostler helper, while engaged in servicing locomotives in the yards of a carrier, the

benefit of the Safety Appliance Acts, including the Boiler Inspection Act, which this Court and other United States Courts of Appeal, as we have pointed out, have repeatedly held, applied to brakemen, inspectors and others injured in the yards of a carrier engaging in interstate commerce.

Petitioner on the shift from 3:30 to 11:30 P. M., was the hostler helper in the yards of respondent, Gulf Company, at Gainesville, Texas, where locomotives, engaging in interstate commerce, were taken as they returned from interstate runs to be serviced and go out again on other interstate runs. Petitioner reported for work at 3:30 P.M. on January 10, 1946, and worked until 11:30 and during the course of a day's work, he would service eight or ten locomotives (Tr. 20). During the several stages of a servicing operation as the locomotive advanced from post to post, the hostler drove and the hostler helper performed the several tasks that were allotted to him. The locomotive was switched first to the sand chute, then to the water spout, then on to the oil spout and finally to the inspection pit where the hostler left and the hostler helper finished whatever else was to be done about a locomotive before it went out on a run.

Locomotive Number 3939 came into the yard around 8 o'clock and the hostler and petitioner took over (Tr. 21). With the hostler in the cab, petitioner crawled up over the front of the locomotive to the cat walk and the hostler drove the locomotive to the sand chute where petitioner spent five or ten minutes filling the sand dome (Tr. 22); petitioner then threw the switches and the hostler drove the locomotive to the service track (Tr. 24); then on to the water spout where petitioner, up on top of the tender, put in the water; that took another fifteen minutes. The hostler then drove the locomotive,

this time only 25 feet, to the oil spout where with the hostler in the cab the petitioner on the tender, petitioner spent around fifteen minutes putting in oil (Tr. 25). Again there were switching operations back and forth, petitioner throwing the switches and the hostler driving until the hostler pulled the locomotive up to the pit where it was partially inspected—the bottom step, but not the top step, on the front end of the tender where petitioner fell, by petitioner's forearm, Matthew Jackson Hassell, between 7 and 8 o'clock (Tr. 90), not overlooking that it was not until around 8:00 when this locomotive came in (Tr. 20) and that the inspector's work should come after the others have finished.

After the hostler left and while the locomotive remained over the inspection pit, petitioner got oil for the lubricators and waste for the engine from a little house 150 feet away (Tr. 26, 27), checked the lubricators, started for the round house, but then remembered the journal box lid hook and the waste bucket that were not in their places and returned, climbing on the tender from the rear, he took care of the waste bucket and the journal box lid hook and started off the tender through the cab, where he had not been before on that night, stepped in the grease on the top step, fell and was injured. Petitioner serviced eight or ten locomotives during each working day—not locomotives in the round house but locomotives "in use" as they returned from interstate runs. He was not a repair man and he did not make repairs. Each and every locomotive with which petitioner as hostler helper had anything to do was "in use" and in frequent motion until it arrived over the inspection pit where petitioner finished his work before the locomotive started on another run. The fire in the fire box of the locomotive was burning at the time of the

occurrence (Tr. 31, 70). The dials were lit up (Tr. 31) and the servicing which petitioner did was the work which was done before an engine goes out on a run (Tr. 70). On that locomotive number 3939 nothing more remained to be done but petitioner, after his injury, and before he left for home, did service a few more locomotives (Tr. 34).

To arrive at its conclusion that this locomotive Number 3939 was not "in use" or "in service," the Court of Appeals for the Seventh Circuit relies upon *New York C. & St. L. Ry. Co.*, v. *Kelly*, 7 Cir. 70 Fed. (2d) 548, 551, Cert. den. 293 U.S. 595, but neither that case nor any or either of the other cases cited by the Court of Appeals, in light of *Brady* v. *Terminal R.R. Assn.*, 303 U.S. 10, is apposite here. In the *Kelly* case the car involved was a defective car and was so marked. It had been undergoing repairs on a repair track for three days and the Court in its opinion said:

> "After a defective car reaches the place of repair, the Safety Appliance Act is unapplicable, because such car has been withdrawn from service and is not in use under the provisions of the Act."

The answer to the *Kelly* case and the case which distinguishes it and is controlling here is *Brady* v. *Terminal R. R. Assn.*, 303 U.S. 10. In the *Brady* case the plaintiff there, like the petitioner here, was employed in the railroad yards. He was a car inspector, and was employed by the Wabash Railroad in its yard at Granite City, Illinois, and was injured while inspecting a car which was one of a string of cars brought by the defendant from St. Louis to Granite City and placed upon the track of the Wabash known as "receiving" or "inbound" track. The purpose of the inspection was to determine whether the cars were to be accepted by the Wabash and

the first question was whether or not a car can be said to have been "in use" by the defendant at the time in question. The "use movement or hauling of defective car" within the meaning of the statute, had not ended when the plaintiff sustained his injuries. The car had been brought into the yard at Granite City and placed upon a receiving track temporarily, pending the continuance of transportation. If not found defective, it would proceed to its destination. If found defective it would be subject to removal for repairs. It was not a case where a defective car had reached the place of repair. The defective car there had not been withdrawn from use. Locomotive Number 3939 involved in this case, was not in bad order and had not been withdrawn from use or service. Between seven and eight o'clock that night it had been inspected by the respondent Gulf Company's lead machinist, Matthew Jackson Hassell (Tr. 83, 89, 90) who had charge of the hostler and hostler helper. It was not in need of repairs. There was fire burning in the fire box and the work performed was the work done before an engine goes out on a run (Tr. 70). The dials in the locomotive cab were on and illuminated (Tr. 31, 53).

In *Brady* v. *Terminal R. R. Assn.* with respect to the car inspector the Court distinguished *New York C. & St. L. R. R. Co.* v. *Kelly,* 70 Fed. (2d) 548, 551 and *B. & O. R. Co.* v. *Hooven,* 297 Fed. 919, 921, 923, both relied upon by the Court of Appeals for the Seventh Circuit, and, specifically holding that these cases were not apposite with respect to the car inspector and the work being done by him, at page 13 of the opinion, said:

> "The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situ-

ation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The 'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago, Great Western R. Co.* v. *Schendel,* 267 U.S. 287, 297, 292. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs.

"It is not a case where a defective car has reached a place of repair. See *Baltimore & Ohio R. Co.* v. *Hooven,* 297 Fed. 919, 921, 923; *New York C. & St. L. R. Co.* v. *Kelly,* 70 F. (2d) 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 21, 22; *Delk* v. *St. Louis & San Francisco R. Co.,* 220 U.S. 580, 584-586; *Great Northern Railway Co.* v. *Otos,* 239 U.S. 349, 351; *Chicago Great Western R. Co.* v. *Schendel, supra. The Minneapolis etc. Ry. Co.* v. *Goneau,* 269 U.S. 406. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute."

In *Johnson* v. *Southern Pac. Co.,* 196 U. S., 1 Johnson was acting as head brakeman on a freight train, of the Southern Pacific Company which was making its regular trip between San Francisco, California, and Ogden, Utah. Upon reaching the town of Promontory, Utah, Johnson was directed to uncouple the engine from the train and couple it to a dining car belonging to the company which was standing on a side track, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The engine and dining car were not equipped with automatic couplers and it was necessary for Johnson and he was ordered to

go between the engine and the dining car to accomplish the coupling. In doing so, Johnson's hand was caught between the engine bumper and the dining car bumper and crushed, which necessitated amputation of the hand above the wrist. On the trial the Court instructed the jury to find for the defendant and the Circuit Court of Appeals for the Eighth Circuit affirmed.

The locomotive was not equipped with automatic couplers and did not comply with the Safety Appliance Act. The Circuit Court of Appeals had held that the dining car was empty and had not been actually entered upon its trip. It was not used in moving interstate traffic and hence it was not within the Act.

But our Supreme Court, page 21, said:

> "The dining car had been used for several years to furnish meals to passengers between San Francisco and Odgen and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train, according to intention, and it was therefore dropped off at Promontory to be picked up by that train as it came along that evening."
>
> "The presumption is that it was stocked for the return, and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not 'an empty' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras in *Voelker* v. *Railway Company,* 116 Fed. Rep. 867, that "it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company because the cars were loaded but would not be binding upon the return trip, because the cars are empty.'"

"Counsel urges that the character of the dining car at the time and place of injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use and *Coe* v. *Errol*, 116 U.S. 517, is cited as supporting the contention.

• • •

"Confessedly this dining car was under the control of Congress while in the act of making its interstate journey and in our judgment, it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law." (Italics ours.)

Another case which involved the Safety Appliance Act, and the death by accident of the fireman who had serviced and prepared a locomotive for use but which had not yet started on its journey is *North Carolina R. R. Co.* v. *Zachary*, 232 U.S. 248. In that case suit was brought in the Superior Court of Gilford County, North Carolina, to recover damages for the negligent killing of Burgess, a locomotive fireman in the employ of the Southern Railroad, lessees of the defendant. The plaintiff's intestate was employed at the Selma Switch Yards in discharge of his duties as a fireman on engine Number 862, and about 8:00 o'clock P.M. on April 29, 1909, *after inspecting, oiling, firing and preparing the engine* for starting on a trip from Selma to Spencer, N. C. attempted to cross certain tracks that intervened between the engine and his boarding house, which was located a short distance away. His view was obstructed by another engine, No. 716, which had its blower on, and was making a loud noise, so that plaintiff's intestate could not hear a third engine—Number 1551 used in the yards which was running backward at a reckless and dangerous rate of speed, without headlight and without an adequate and competent

crew. Plaintiff's intestate stepped from the track in the rear of engine Number 716 and was about to step on the main line in an attempt to cross it and was struck and killed by the shifting engine. The state Court held that the action was brought under the statute of North Carolina, that the Federal Act did not apply. There was a judgment for the plaintiff. The Supreme Court of North Carolina overruled the contention of defendant that the Federal Employers' Liability Act applied and also held that the action was properly brought under state law. A Writ of Certiorari to the North Caroline Supreme Court was allowed. Our Supreme Court in its opinion, p. 259, held that the evidence tended to show that train Number 72 of the Southern Railway had come to Selma, N. C. from Pinners Point, Va., and other places, and that a shifting crew was "working" this train so as to take two cars from it and put them in the train that was to include these and other cars to be hauled from Selma to Spencer, N.C. by Engine Number 862, and that deceased was *employed on this trip as a fireman, for the trip that was about to begin and had already prepared his engine for the purpose.* The Court further analyzing the evidence, held that the locomotive and cars involved were engaged in interstate commerce, and at page 260 said:

> "It is argued that so far as appears, deceased had not previously participated in any movement of interstate freight, and that through cars had not yet been attached to his engine, his employment in interstate commerce was still *in futuro. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that the interstate freight cars had not yet been coupled up is legally insignificant."* (Italics ours.)

Again it is said that because the deceased had left his engine and was going to his boarding house, he was on a personal errand and not upon the carrier's business, but deceased was shortly to depart upon his run, having just prepared his engine for the purpose and that he was not going beyond the limits of the railroad yard when he was struck. There is nothing to indicate that his brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty" and employed in commerce, notwithstanding his absence from the locomotive engine.

In *Chicago G. W. R. Co.* v. *Schendel,* 267 U.S. 287, one Ring was fatally injured while in the defendant's service and while engaging in interstate commerce. Breach of the Safety Appliance Statute was alleged. It was there contended that the car had come to rest on the side track and had ceased to be "used" within the meaning of the statute. At page 291 of the opinion, the Court said:

> "Under the circumstances disclosed, we think it clear that the use movement or hauling of the defective car within the meaning of the statute had not ended at the time of the accident. To cut this car out of the train, so that the latter might proceed to destination was the thing in view and an essential part of the undertaking in connection with which the injuries arose."

In *Minneapolis Etc. Ry. Co.* v. *Goneau,* 269 U.S. 406, 409, the action was under the Employers' Liability Act and the Safety Applicance Act. The argument there was that the Safety Appliance Act did not apply, that the defective car being motionless at the time of the accident, was not then in use, but the Court would not sustain the contention of the defendant. At page 410 of the opinion, the Court said:

> "Nor can it be said that Goneau was engaged in doing repair work. He was not a repair man, but a brakeman, and was not repairing the carrier iron, but was attempting to move it into place to support the coupler, so that the coupling could be made, and the train proceed. In short, he was engaged in the work of coupling cars, that is, as was said by the Supreme Court of Minnesota, a 'coupling operation' ".

In *Fort Street Union Depot Co.* v. *Hillen,* 6 Cir. 119 Fed. (2d) 307, Cert. den. 314 U.S. 642, an action was brought under the Federal Employers' Liability Act by the plaintiff to recover damages for the death of her husband who was injured while working as a switchman in the defendant's railroad yards at the Fort Street Union Depot in Detroit. A violation of the Federal Safety Appliance Act was alleged. It was contended that the Wabash car involved in the occurrence was not "in use" within the meaning of the Safety Appliance Act. The Court at page 312 said:

> "The Wabash club car had not been withdrawn from service and was 'in use' within the meaning of the statute, even though motionless."

In *Erie R. Co.* v. *Russell,* 2 Cir., 183 Fed. 722, 724, Cert. den. 220 U. S. 607, the first question in the case was whether or not the acts of the defendant constituted a violation of the Federal Safety Appliance Act. The first phase of this question was whether the car with the defective coupler was, at the time of the accident, "in use" within the meaning of the amended act. To show that the car was in use, within the meaning of the Statute, the Court at page 224, said:

> "It is pointed out that the car was not being hauled at the time of the accident, but was standing upon a switch track for the insertion of the knuckle in the coupling apparatus, and it is contended that it was not being used within the contemplation of the

statute. We think, upon the authority of *Johnson* v. *Southern Pacific Co.*, 196 U.S. 1, that this contention is not well founded. The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs. The insertion of the knuckle was a simple matter. The car was stopped only temporarily and it was intended to couple it to the cars as soon as repaired. These facts seem clearly to distinguish this case from cases cited in the defendant's brief, where accidents occurred when cars have been sent to repair shops or placed upon dead tracks used for repair purposes."

To the same effect is *Texas and Pac. Ry. Co.* v. *Rigsby*, 241 U.S. 33, 43 and *Great Northern Railway Co.* v. *Otos*, 239 U.S. 349, 351.

Petitioner worked from 3:30 in the afternoon to 11:30 at night. During that period, he serviced eight or ten locomotives all of which were "in use". There are 24 hours in a day and petitioner worked but one shift from 3:30 to 11:30 P.M. If the same number of locomotives moved on the other shifts, there were 24 or 25 locomotives at least, coming into that yard each 24 hours, each of which "had just completed an interstate run, and was being serviced and made ready for another interstate run". The Boiler Inspection Act and the Safety Appliance Acts are to be liberally construed. Neither the car inspector nor the hostler are congressionally excluded from the benefits of the Safety Appliance Statutes. If it is liberal construction to contend that each of these locomotives, as it completed an interstate run and was being made ready for another interstate run where it was delayed only long enough to put sand in the sand dome, fuel oil and water in the tender and check the lubricators, were

out of service during that period, then without any logical reason therefor, it deprives the hostler and the hostler helper of the benefits of these acts which were intended for them, as much as for any other employee at any other time or place under the conditions arising in connection with the service being rendered by the hostler and the petitioner here, who was the hostler helper.

IV.

The Boiler Inspection Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances.

The jury returned a verdict for the plaintiff upon which a judgment was entered. There was evidence from which the jury could find against the respondents for a violation of the Federal Boiler Inspection Act.

> "The language of the Acts and the authorities we have cited make it entirely clear that liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in or the work which *he may be doing at the moment when he is injured.* This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey the Safety Appliance laws is the proximate cause of injury to them, when engaged in the discharge of duty."
>
> *Louisville & Nashville R. R. Co.* v. *Layton,* 243 U.S. 617, 621; *Davis* v. *Wolf,* 263 U.S. 239, 263.

Apposite also is the language of the Court in *Coray* v. *Southern Pac. Co.,* 335 U.S. 520, where an action was brought under the Federal Safety Appliance Act and the

Federal Employers' Liability Act to recover damages for the death of Frank Lucus, an employee of the respondent railroad. The Supreme Court of Utah held that the object of the Safety Appliance Act "insofar as brakes might be concerned" is not to protect the employees from standing, but from moving trains; but the Court at page 522 said:

> "We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employers and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U.S. 589, 597. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in or the work which he may be doing at the moment when he is injured.' *Brady* v. *Terminal R. Assn.*, 303 U.S. 10, 16; *Louisville & N. R. Co.* v. *Layton*, 243 U.S. 617, 621. In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, *petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. Davis* v. *Wolfe*, 263 U.S. 239, 243; *Spokane & I. E. R. Co.* v. *Campbell*, 241 U.S. 497, 509, 510." (Emphasis ours.)

In *Brady* v. *Terminal R. Assn.*, 303 U.S. 10, heretofore cited, the Court, pp. 15, 16, held that an inspector was not to be denied the benefit of the Safety Appliance Act because his work was that of inspection for the purpose of discovering defects. The Court cited *Louisville and*

Nashville R. Co. v. *Layton,* 243 U.S. 617, 621, heretofore cited, holding that the liability "springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment he is injured provided defective equipment is the proximate cause of the injury."

It is submitted that these cases apply and are applicable in every respect, with respect to the work of petitioner, a hostler helper, when he stepped into thick grease on the top step of the tender next to the cab (Tr. 31, 32, 33) and slipped and fell from the top of the tender to the deck of the cab of Locomotive Number 3939 and was injured.

Also in point is *Lilly* v. *Grand Trunk R. Co.,* 317 U.S. 476, 486, heretofore cited; *Myers* v. *Reading,* 331 U.S. 477 482. Helpful also, is *Urie* v. *Thompson,* 377 U.S. 163, 195 and of like import is *Swinson* v. *Chicago St. P. M. & O. Ry. Co.,* 294 U.S. 529 where the Court, with respect to the Safety Appliance Act, at page 531, said:

> "That an employee can recover, if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

Grease on the steps of the tender leading down from the top of the tender to the deck of the locomotive cab, where petitioner had to go in the course of his duties, the presence of which was unknown to petitioner, involved "unnecessary peril to life and limb" enough so as to permit a jury to find that the Boiler Inspection Act had

been violated. *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 485; *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U.S. ...., 94 L. ed. 170, 172, and *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. ...., 94 L. ed. 183, 187.

There was an evidentiary basis therefore, for the verdict and judgment in favor of petitioner.

The case was properly submitted to the jury under the Boiler Inspection Act; and the issues having been determined in favor of petitioner, the judgment of the trial court in that behalf should have been affirmed by the United States Court of Appeals.

Petitioner, therefore, prays that this Court issue its Writ of Certiorari herein and that the final judgment of the United States Court of Appeals for the Seventh Circuit rendered herein, be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 567

JACK F. LYLE,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION, AND GULF, COLORADO AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO THE BRIEF SUPPORTING SAID PETITION.

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February 21, 1950.

TABLE OF CONTENTS.

	PAGE
A Summary Statement of the Case	3
Reason Relied on for Disallowance of Writ	7
The Law	7
Summary of Argument	8
Argument	10
Petitioner's Cases Distinguished	25
Conclusion	28

TABLE OF AUTHORITIES.

Cases.

Baltimore & O. R. R. v. Hooven, 297 Fed. 919 (6th Cir. 1924) 8, 13, 18, 25

Brady v. Terminal R. R. Ass'n, 303 U. S. 10 (1938) 25

Brady v. Wabash Ry., 329 Mo. 1123, 49 S. W. 2d 24 (cert. denied 287 U. S. 619) (1932) 8, 9, 20

Chicago, G. W. R. R. v. Schendel, 267 U. S. 287 (1925) 27

Chicago & N. W. Ry. v. United States, 168 Fed. 236, 238 (8th Cir. 1909) 8, 9, 22

Compton v. Southern Pac. Co., 70 Cal. App. 2d 267, 161 P. 2d 40 (1945) 8, 9, 21

Ehalt v. McCarthy, 104 Utah 110, 138 P. 2d 639, 644 (1943) 9, 23

Erie R. R. v. Russell, 183 Fed. 722 (2d Cir. 1910) 28

Flack v. Atchison, T. & S. F. Ry., 285 Mo. 28, 224 S. W. 415 (cert. denied 256 U. S. 90) (1920) 8, 12

Fort Street Union Depot v. Hillen, 119 F. 2d 307 (6th Cir. 1941) 27

Great Northern Ry. v. Otos, 239 U. S. 349 (1915) .. 28
Harlan v. Wabash Ry., 335 Mo. 414, 73 S. W. 2d 749 (1934) 8, 9, 18
Johnson v. Southern Pacific Co., 196 U. S. 1 (1904) .. 25
Kaminski v. Chicago, M. St. P. & P. R. R., 180 Minn. 519, 231 N. W. 189 (cert. denied 282 U. S. 872) (1930) 8, 18
Lilly v. Grand Trunk R. R., 317 U. S. 481 (1943) 26
Louisville & N. Ry. v. Botts, 173 F. 2d 164 (8th Cir. 1949) 26
McCalmont v. Pennsylvania R. R., 283 Fed. 736 (6th Cir. 1922) (cert. denied 260 U. S. 751) 8, 15
Minneapolis &c. Ry. v. Goneau, 269 U. S. 406 (1926) .. 27
New York, C. & St. L. R. R. v. Kelly, 70 F. 2d 548 (7th Cir. 1934) (cert. denied 293 U. S. 595) 8, 17, 25
North Carolina R. R. v. Zachary, 232 U. S. 248 (1914) 26
O'Donnell v. Elgin, Joliet & E. Ry., ... U. S. ....., 94 L. Ed. 170 (1949) 26
Sherry v. Baltimore & O. R. R., 30 F. 2d 487 (6th Cir. 1929) (cert. denied 280 U. S. 555) 8, 15, 18
Texas & Pacific Ry. v. Rigsby, 241 U. S. 33 (1916) .. 28

STATUTES.

Federal Boiler Inspection Act, 45 U. S. C. A. § 23 .. 7
Federal Employers' Liability Act, § 45 U. S. C. A., § 51 et seq. 9, 23
Federal Safety Appliance Act, 45 U. S. C. A. § 1 et seq. 12

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The only question to be considered is whether an appropriate ground exists for the issuance of a writ of certiorari. Petitioner has failed to show that the court below rendered a decision in conflict with another court of appeals on the same matter; or decided a federal question in a way probably in conflict with applicable decisions of

this Court; or so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 38(4)(b).

Counsel seemingly have failed to perceive the elementary distinction between an extended argument on the merits and an argument on the issue of whether certiorari should or should not be granted. They have included many facts which have no bearing on the limited question here involved. In addition, many of their purported statements of fact are not supported by the record. For these reasons, we feel that a restatement of the case, confined to accurate facts material to a consideration of the petition, might be helpful to the Court and take the liberty of restating it as follows:

A SUMMARY STATEMENT OF THE CASE.

The petitioner was employed at Gainesville, Texas, as a hostler's helper by the respondent Gulf, Colorado and Santa Fe Railway Company (Tr. 18). A "hostler's helper" is not really a hostler's helper. That is to say, a hostler drives locomotives in railroad yards and roundhouses. He is a yard engineer (Tr. 48). A hostler's helper supplies locomotives with sand, water, and fuel oil, fills the lubricating valves, supplies waste for the engine (Tr. 19), and cleans up any oil or grease on top of the tender or elsewhere on the locomotive (Tr. 48). He "services" the locomotives (Tr. 34), but does not participate in any way in their movement. Neither man helps the other in the performance of his duties, so that the designation "hostler's helper" is a misnomer (Tr. 48).

When a locomotive pulls a train into Gainesville, the road engineer and fireman are through with the engine. They go home (Tr. 20). A hostler then takes over the locomotive and moves it to the roundhouse or elsewhere in the yards.

January 10, 1946, Engine 3939, which is owned by the respondent Atchison Company but operated into Gainesville by employees of the respondent Gulf Company (Stipulation, Tr. 44), completed a run about 8 o'clock P. M. The engineer and fireman left the engine and the hostler got up in the cab and moved the locomotive (which had been detached from the train) to the sand chute near the roundhouse, where petitioner filled the sand dome (Tr. 21). The engine was then moved to the service track opposite the water spout, where petitioner filled the tank with water (Tr. 24). The engine was then moved up about 25 feet where petitioner placed oil in its tank (Tr. 25). The hostler then moved the engine to the inspection pit, also near the roundhouse, where it was stopped (Tr. 26).

The hostler left the locomotive after this movement, and thenceforth the petitioner was the only person on or about the engine. At this place at the pit, petitioner, on the ground, checked the lubricators on the engine. He found it necessary to go to an oil house nearby to get some oil for the lubricators and waste for the engine (Tr. 26, 27). After he had taken care of the lubricators, petitioner started into the roundhouse and happened to think about having noticed, while he was on top of the tender of the locomotive servicing the oil and water, a bucket and a journal-box-lid hook that were out of place on top of the tender. He climbed back on to the tender, placed the bucket and hook in their places, and then started down through the cab (Tr. 28).

A person descends from the top of a tender to the deck of a locomotive cab—a distance of about five feet—by means of two fan-shaped iron steps (Tr. 29), roughly about the size of a man's foot (Tr. 52). On either side of these steps is a hand rail or grab iron for a person to use in ascending or descending (Tr. 30). It was while descending these steps that plaintiff in some manner fell and hit his left elbow either against the end of the tender or against the deck of the locomotive cab, resulting in a fracture of the olecranon process of the left ulna.

As we have seen, at the time of the accident, the engine had been abandoned at the inspection pit so that the petitioner could complete his work thereon. He was the only person on or about the locomotive at the time, and the true facts surrounding the injury are known apparently only by him.

The complaint as originally filed alleged the occurrence as follows: That petitioner "went to the top of the water and fuel tank of said engine to remove a journal lid hook and pail a [*sic*] journal waste and after completing said work, proceeded to leave the top of the water tank and

to step on the steps provided at the end of the tank between the engine cab and the tender, and while he was descending said steps and holding on to the grab iron, *he was caused to slip due to oil and grease which he had accumulated on his shoes while on top of the water and fuel tank,* and he was caused to strike his elbow and fall to the deck of the cab of the engine" (Tr. 4) [Emphasis supplied].

Subsequent to the filing of the complaint, the petitioner's deposition was taken for discovery purposes (Tr. 67), at which time petitioner swore that he had carried a flashlight to the top of the tender with him and had inspected the top of the tender and found it all oily (Tr. 67); that the oil was formed all over, but the biggest puddle was around where "they" [he, himself] put it in there (Tr. 68). He testified on his deposition that he had put the oil in the locomotive and that it was one of his duties to clean up excess oil like that (Tr. 68). In regard to the steps, *petitioner testified on deposition that he did not notice their condition with respect to oil or grease* (Tr. 69).

After the deposition had been taken, petitioner, fearing the outcome of his suit since his own negligence had been thus established, amended his complaint. In lieu of the original allegation regarding the occurrence, the amendment alleged that as petitioner proceeded to leave the top of the water tank and to step on the steps provided at the end of the tank between the engine cab and the tender, he was caused to slip on oil and grease and to strike his elbow and fall (Tr. 14).

On the trial, petitioner, the only occurrence witness, testified that as he started to get down from the top of the tender, holding on to the grab irons with both hands, his right foot slipped off the step (Tr. 30, 31). He testified that he fell to the floor of the cab and landed on his left

elbow (Tr. 32); that after he had fallen he looked at the step and saw some thick, heavy, blackish-looking grease on the bright metal step; that the step was nearly covered with grease a half-inch thick (Tr. 32-3). He gave this unequivocal testimony after having sworn under oath that he did not notice the condition of the step with respect to oil or grease (Tr. 69).

Further, at the trial petitioner testified, as he had on deposition, that it was his duty as a hostler's helper to clean up any oil, grease or foreign substance on or about the locomotive. This duty was not limited to cleaning up oil or grease only if reported by the foreman, as counsel suggest (Pet. Br., p. 14). See Tr. 49, 68, 142, also opinion of court below.

Eight distinct acts of negligence were charged in the complaint, but they were all abandoned at the trial, and at the completion of all the testimony counsel for petitioner announced that he was submitting his case solely on the issue of violation of the Boiler Inspection Act (Tr. 170) in that respondents had permitted grease, oil, or foreign substance to be and remain upon the step. All of the court's instructions were based solely on the alleged Boiler Inspection Act violation, and no instructions pertaining to negligence were given (Tr. 171). Petitioner took no exception to the omission of negligence charges.

Respondents, at the conclusion of all the evidence on the trial, made timely motions for directed verdict and renewed their earlier motions to strike from the complaint the allegations pertaining to violation of the Boiler Inspection Act on the ground that the Act was not applicable to this cause for the reason that at the time of the alleged occurrence the locomotive in question was not in use (Tr. 155, 156, 158).

Those motions were denied (Tr. 159).

REASON RELIED ON FOR DISALLOWANCE OF WRIT.

The only thing which was decided by the Court of Appeals was that a locomotive, withdrawn from use so that it may be serviced and placed in condition for further use, is not subject during that period of withdrawal to the penalties of the Boiler Inspection Act, since it is not during such withdrawal *in use on the line* and *employed in active service,* as those terms are used in the Act.

As we shall proceed to demonstrate, this uncomplicated proposition of law is so well established by the authorities that there exists no perceptible reason for a review of the decision below.

THE LAW.

The BOILER INSPECTION ACT, 45 U. S. C. A. 23, provides that:

> "It shall be unlawful for any carrier *to use* or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and *safe to operate* in the service to which the same are put, that the same may be *employed in the active service of such carrier* without unnecessary peril to life or limb, * * *." [Emphasis supplied.]

SUMMARY OF ARGUMENT.

At the trial, the petitioner withdrew his allegations of ordinary negligence—having introduced insufficient proof to support them—and submitted his case solely on the alleged violation of the Boiler Inspection Act.

Since at the time of the accident, the locomotive had been withdrawn from service so that it could be supplied, "serviced," and made ready for another run, it was not *in use* or *employed in the active service,* as those two terms are used in the Boiler Inspection Act. Therefore, the provisions of the Boiler Inspection Act are not applicable, and there was no violation of that Act. *New York, C. & St. L. R. R.* v. *Kelly,* 70 F. 2d 548 (7th Cir. 1934), *cert. denied* 293 U. S. 595; *Sherry* v. *Baltimore & O. R. R.,* 30 F. 2d 487 (6th Cir. 1929), *cert. denied* 280 U. S. 555; *Baltimore & O. R. R.* v. *Hooven,* 297 Fed. 919 (6th Cir. 1924); *McCalmont* v. *Pennsylvania R. R.,* 283 Fed. 736 (6th Cir. 1922), *cert. denied* 260 U. S. 751; *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236, 238 (8th Cir. 1909); *Compton* v. *Southern Pac. Co.,* 70 Cal. App. 2d 267, 161 P. 2d 40 (1945); *Kaminski* v. *Chicago, M. St. P. & P. R. R.,* 180 Minn. 519, 231 N. W. 189, *cert. denied* 282 U. S. 872 (1930); *Harlan* v. *Wabash Ry.,* 335 Mo. 414, 73 S. W. 2d 749 (1934); *Brady* v. *Wabash Ry.,* 329 Mo. 1123, 49 S. W. 2d 24, *cert. denied* 287 U. S. 619 (1932); *Flack* v. *Atchison, T. & S. F. Ry.,* 285 Mo. 28, 224 S. W. 415, *cert. denied* 256 U. S. 90 (1920).

Congress studiously limited the application of the absolute requirements of the Boiler Inspection Act to locomotives actually in use in the active service of the carrier. It did not declare unlawful the *ownership* or *loan* of a locomotive which is not in proper condition.

Since there is an unqualified duty to maintain locomotives in use in a condition which is not unsafe for those who are required to use them in active service, Congress logically contemplated that a locomotive could only be placed in such a condition of safety by taking it out of use and effecting proper repairs and services. *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236 (8th Cir. 1909).

During the time that a locomotive is withdrawn from use for servicing or repairs, a carrier's duty is limited to one of ordinary care under the general provisions of the Federal Employers' Liability Act. *Compton* v. *Southern Pac. Co.,* 70 Cal. App. 2d 267, 161 P. 2d 40 (1945); *Brady* v. *Wabash Ry.,* 329 Mo. 1123, 49 S. W. 2d 24, 29, *cert. denied* 287 U. S. 619 (1932); *Harlan* v. *Wabash Ry.,* 335 Mo. 414, 73 S. W. 2d 749, 758 (1934); *Ehalt* v. *McCarthy,* 104 Utah 110, 138 P. 2d 639, 644 (1943).

The ruling of the court below is correct, and petitioner has advanced no valid reason for the allowance of a writ of certiorari. Rule 38(4)(b).

ARGUMENT.

The Locomotive Was Not in Use in Active Service. Therefore, the Boiler Inspection Act Is Not Applicable.

Since petitioner relied entirely for recovery upon a violation of the Boiler Inspection Act, we contend that the Court of Appeals was correct in reversing a verdict and judgment for petitioner, because at the time of the alleged occurrence Engine 3939 was not in use in active service. In other words, there was no violation of the Act.

As we have indicated, prior to the accident the engine crew had left the engine in the yards at Gainesville, upon completion of its run (Tr. 20). Servicing was necessary before the engine could make another trip, and a hostler moved the engine to the service track and inspection pit, all near the roundhouse, for such servicing (Tr. 21). It was petitioner's duty to undertake the servicing of this locomotive. His duties as hostler's helper required him to put sand, oil, and water in the engine, to fill up the lubricator, to clean up any excess oil or grease on or about the locomotive, and to do anything else that the engine needed (Tr. 48-49). He serviced the engine while it was at the roundhouse (Tr. 22, *et seq.*). The hostler who moves or drives the engine usually or normally leaves the engine after it has been moved to the roundhouse for servicing, and in this case the hostler in fact had left the engine (Tr. 49). There was no reason for the engine to be moved or for the hostler to return to the engine until after petitioner would have completed his work (Tr. 50). The engine was not coupled to any cars or other engines; it was standing all by itself and was not moving (Tr. 49).

At the time of the occurrence, no one except the petitioner was on or about the engine (Tr. 49). While undergoing this servicing, the engine admittedly was being made ready for another run. However, from all that appears, no other run was ever made. Assuming that it did make another run, there is no showing whether that run was made the next day, the next week, or the next month. Obviously, it was out of service and could not have been put back into use until all of the necessary servicing had been completed, for as everybody knows an engine cannot run without fuel, water, and other supplies.

As aptly stated by the court below, 177 F. 2d 221, 223 (Tr. 184):

> "* * * It is opposed to reality to say that under such circumstances the locomotive was in use so that the mandatory duty imposed by the Boiler Inspection Act then applied. To service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it. To apply the mandatory liability in favor of one who puts an engine in readiness for use is to enlarge and extend the intent of Congress in enacting the legislation.
>
> "This conclusion * * * is in line with the decisions of other courts, both state and national, interpreting the provisions of this statute. * * *
>
> "* * * it seems clear to us that there is but one answer to the question presented and that is that the locomotive in question was not in use within the meaning of the Boiler Inspection Act at the time of the injury. Consequently plaintiff failed to make out a *prima facie* case."

On these facts there can be no denial that at the time of the occurrence, Engine 3939 had been taken out of service and moved to the roundhouse to be serviced and readied for another run. The engine necessarily was not "in use," and therefore the Boiler Inspection Act is not applicable.

The Act does not declare unlawful the *ownership* or the

borrowing of a locomotive which is not in proper condition and safe to operate. The prohibition is against the *employment in the active service* of such a locomotive.

Neither does the Act apply to locomotives when temporarily withdrawn from active use, even though they are intended to be again and shortly put in such active use.

Flack v. *Atchison, T. & S. F. Ry.*, 285 Mo. 28, 224 S. W. 415 (*cert. denied* 256 U. S. 90) (1920), was a suit under the Federal Employers' Liability Act for the death of a boiler foreman while inspecting and attempting to repair a locomotive boiler. There was a verdict and judgment for plaintiff, which was reversed by the Supreme Court of Missouri. At the time of the accident the engine was in defendant's roundhouse. Even though the Boiler Inspection Act was not brought into the case until after argument in the Missouri Supreme Court, the court waived the tardy appearance of this suggestion, and overruled it because, as the court said (p. 423):

> "At the time of the accident here in suit, the engine in question was not being used in 'moving interstate or foreign traffic,' nor was it 'in the active service of such carrier in moving traffic' within the intent and purpose of that act, as we construe it. The engine was undeniably being prepared for use in interstate traffic, and the deceased met his death while engaged in that preparation. The work then being done was necessary in order to avoid a violation of the provisions of the act whose penalties [plaintiff] now invokes."

The SAFETY APPLIANCE ACT (45 U. S. C. A. 1, *et seq.*) has a prohibition similar to that contained in the Boiler Inspection Act. It provides that it shall be unlawful for a common carrier "*to haul* or *permit to be hauled* or *used on its line* any car subject to the provisions of this Act not equipped with" appliances provided for therein. The duty imposed upon railroads by that Act, like the duty

under the Boiler Inspection Act, is an absolute, unqualified one. The courts, Federal and State, have interpreted the two acts similarly.

The leading case on the nonapplicability of the Boiler Inspection and Safety Appliance Acts to locomotives and cars temporarily withdrawn from use for repairs or servicing is *Baltimore & O. R. R.* v. *Hooven*, 297 Fed. 919 (6th Cir. 1924). There, as the court itself stated in the opinion, a locomotive had been temporarily withdrawn from service and was undergoing minor repairs in a roundhouse "in preparation for early return to service." The purpose of the withdrawal was so that the engine could undergo its regular monthly inspection and so that certain running repairs could be made. As was the custom as to engines brought into the roundhouse, this locomotive was sprayed with oil for the purpose of conditioning it and protecting it from rust. The oil had not been removed, and as a consequence, Hooven, a machinist, descending after making minor adjustments on top of the boiler, slipped in stepping from the end of a steel running board, where the oil had been left, and fell from the engine. As stated by the court (p. 920): "At the time of the accident the engine was about ready for service, and *was called to go out* on the road shortly thereafter." Plaintiff had judgment below, which was reversed on appeal, the Circuit Court of Appeals stating the question to be: "Is it the intent of the Act to have the absolute liability imposed by it attached to the vehicle during such time as it is withdrawn temporarily from actual service, and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned?" Said the court (p. 922):

> "* * * In actions under the Safety Appliance Act the statutory criterion is whether the car is 'in use' 'on its line,' within the true purpose and scope of the

act. * * * When we regard the reasons upon which the broad extent of the act has been upheld and its constitutionality sustained, it is difficult to see wherein the safety of a highway of interstate commerce may be endangered by a locomotive withdrawn from service and at rest in a stall of the railroad's roundhouse undergoing repairs, even though such withdrawal be but temporary.

"* * * the act of repairing an appliance which becomes defective in use * * * [is an act] in compliance with and not in violation of law, and is not in our judgment [an act] which the law intends to penalize. The process of conditioning an engine and preserving it from deterioration through rust by spraying it with oil appears to be * * * the usual and necessary treatment of the engine during monthly inspection, contributing to the safety of the apparatus while in actual use. If during such treatment the safety appliances are rendered temporarily insecure by the presence of oil upon them, it does not seem to us to present a condition that comes within the purview of the act, when as in this case the engine is completely withdrawn from all relationship to the highways of interstate commerce, and from all connection with the movement of trains thereon.

"* * * it becomes the clear duty of the carrier in conformity with [the purpose of the Safety Appliance Act] to exercise a high degree of diligence in discovering and repairing defects in its safety appliances and in withdrawing the car from commercial use while they exist. Such diligence seems also to be imposed on the carrier by the Boiler Inspection Act. * * * Can it be said that it is the intention of the Safety Appliance Act to penalize such diligence by extending the absolute liability of the carrier through the period of replacement and repair, and reaching even a case where the insecure condition of the appliance which failed was the natural and temporary result of the reconditioning process? We think such contention untenable, unless supported by specific direction of the statute.

"* * *

"It will be observed that it is within the contemplation of the statute that safety appliances will become defective, and that such defects will necessitate withdrawal from service of the defective car while repairs are being made, and for that purpose the penalty of the statute is for the time being lifted."

The court concluded (p. 924) that the Act was not applicable, it having found no cases from which any holding may be inferred to the effect that equipment at rest and not in relation to movement of other cars is subject to the penalties of the Act. Said the court (p. 924):

"* * * The plaintiff based his right to recover for his injury solely upon the absolute liability claimed to be imposed upon the defendant by the Safety Appliance Act, and it was on this theory that it was submitted to the jury by the trial court. * * * This being so, the District Judge erred in denying the defendant's motion for a directed verdict. * * *"

To the same effect is the opinion in *McCalmont* v. *Pennsylvania R. R.*, 283 Fed. 736 (6th Cir. 1922) (*cert. denied* 260 U. S. 751). There, the Circuit Court of Appeals said (p. 739):

"* * * In the present case no hauling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop. * * * Fully remembering that the benefits of the act are not confined to those who were actually trying to couple at the moment of the injury, still it does not follow that they extend to one who is merely putting the couplings in condition for a use which, though it may come soon, is distinctly of the future and not of the present."

Sherry v. *Baltimore & O. R. R.*, 30 F. 2d 487 (6th Cir. 1929) (*cert. denied* 280 U. S. 555), was another action

under the Safety Appliance Act. The plaintiff was a car inspector whose duty it was to inspect bad order cars, to make such repairs as could be made on the ground, or to order the car to the repair shops for that purpose. One car had been placed upon a ladder track in the general yard, cut from the train, and reported to plaintiff as having a defective brake. In order to determine whether the brake was operative, having previously discovered that the car had a badly bent brake staff, plaintiff mounted to the top of the car and attempted to apply the brake. The brake staff broke and threw plaintiff to the ground. At the trial, a verdict was returned for the defendant on the ground that the car was not in use or being hauled, and, therefore, the provisions of the Safety Appliance Act were not applicable. That judgment was affirmed. Said the court (p. 488):

"* * * The remedy is statutory, and liability, where the statute attaches, is absolute and independent of negligence.

"* * * The absolute liability above referred to is implied from these statutory provisions, and it is to be noted that *the inhibited act* on the part of the railroad company in each *is 'the hauling or permitting to be hauled or used'* on its line any car with the required equipment, in defective condition. This constitutes the 'violation of the act' we have above referred to in statement of the general principles deduced from precedent. It has accordingly been held by this court that *the act has no application to equipment withdrawn from service and undergoing minor repairs preparatory to early return to service. B. & O. R. Co.* v. *Hooven* (C. C. A.) 297 F. 919. Cf. *McCalmont* v. *Pennsylvania R. Co.* (C. C. A.) 283 F. 736.

"In the instant case the defective car was not being hauled or used by the defendant, except in that it was stored temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately

contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair. * * *

"* * * The defectively equipped car not having been in use within the meaning of the Safety Appliance Act, at the time of injury to the plaintiff, the verdict was properly directed for the defendant, and the judgment rendered thereon is affirmed." [Emphasis supplied.]

New York, C. & St. L. R. R. v. *Kelly*, 70 F. 2d 548 (7th Cir. 1934) (*cert. denied* 293 U. S. 595). Plaintiff was a field brakeman in a yard crew who sustained a personal injury due to the absence of a grabiron at the top of the side ladder of a freight car. The car from which he fell was on the repair track for repairs. The vital question was whether or not a freight car removed from the service to the extent it is taken out of actual service and put on the repair tracks for specified repairs is "in use" within the meaning of the Safety Appliance Act. The Circuit Court of Appeals was of the opinion that it is not, and reversed a judgment for plaintiff. Said the court (p. 550):

"After a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act, nor does mere shifting of cars within the place of repair put the car 'in use' within the meaning of the statute. [Citing cases.]"

Further from the opinion (p. 551):

"Had the car in question been en route to the repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off the handhold or any other of the safety appliances necessary to effect the repairs, without violating the Safety Appliance Act.

"Since it is so clear that the car was not in use, it was erroneous to submit the case to the jury; * * *"

Kaminski v. *Chicago, M. St. P. & P. R. R.*, 180 Minn. 519, 231 N. W. 189 (*cert. denied* 282 U. S. 872) (1930). Plaintiff, a rear brakeman (switchman), was injured in a heavy repair yard—a yard to which freight cars needing extensive repairs are taken, and which is used only for making repairs. Plaintiff attended to the making of couplings of a cut of cars. When the couplings were completed he was standing on the right-hand side of the rear car and gave a signal to go ahead. As the cars began to move, he put his left foot in the stirrup and grasped a grabiron, which came off, causing him to fall to the ground. Since the grabiron was to be removed, the nuts had been burned off and the grabiron simply rested on the ends of the bolt with nothing to hold it in position. Plaintiff had a verdict and judgment below, but this was reversed by the Supreme Court of Minnesota. The court relied upon *Baltimore & O. R. R.* v. *Hooven* and *Sherry* v. *Baltimore & O. R. R.*, *supra*, and reached the conclusion that "where a bad order car has been withdrawn from service and taken to and placed in a repair yard where it is being repaired, subsequent movements of the car made in the course of the work and for the purpose of facilitating it are not within the operation of the Safety Appliance Act."

Harlan v. *Wabash Ry.*, 335 Mo. 414, 73 S. W. 2d 749 (1934). This was a suit under the Boiler Inspection Act. The engine in question had come in from the west, and was put on the "go out" track for the purpose of hauling a train east at about the middle of the afternoon. The plaintiff and his superior, a machinist, were to repair the locomotive stoker. Since they could not open the stoker in the yards, the afternoon run was cancelled and the engine was taken to the roundhouse. Thereafter, plaintiff and his superior went to this engine in the roundhouse, and it was here that plaintiff stepped into an open trapdoor in the locomotive cab and sustained his injury.

The case turned on the question of whether the engine, called for a run, was in use at the time of the occurrence, and in this connection the Supreme Court of Missouri had this to say (p. 753):

"Nor can plaintiff recover under the Boiler Inspection Act for the reason that the engine in question on which plaintiff was working when injured was not at the time in use or moving in interstate commerce, as we held in *Brady* v. *Wabash Ry. Co.*, 329 Mo. 1123, 49 S. W. (2d) 24, 29. * * * This act, like the Safety Appliance Act (45 USCA § 1 *et seq.*), while applicable only to interstate commerce, is narrower in its scope and application than is the Federal Employers' Liability Act. * * * The Boiler Inspection Act, like the Safety Appliance Act, does not rest on negligence, but is absolute in its requirements and is restricted to locomotive engines when in use in moving interstate traffic. It is only when in such use that the engine and appliances are required to be 'in proper condition and safe to operate in the service to which the same are put.' We pointed out in the *Brady* Case that the Safety Appliance Act, and the same is true of the Boiler Inspection Act, does not apply to cars or engines when withdrawn from active use in interstate commerce for temporary repairs, though intended to be again and shortly put in such active use; citing *Baltimore & Ohio Ry. Co.* v. *Hooven* (C. C. A.), 297 F. 919, 922, as holding that the absolute liability of a railroad for defective appliances does not 'follow its instrumentalities of transportation beyond their actual present use or hauling, or, more specifically,' it is not 'the intent of the act to have the absolute liability imposed by it attach to the vehicle during such time as it is withdrawn temporarily from actual service and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned.' The opinion then adds: 'So we think such liability would not attach to the instrumentalities of transportation before their acceptance and actual present use or

hauling in such commerce. In the case mentioned, it was held that the defendant's liability under the Safety Appliance Act did not follow and cover an engine temporarily withdrawn from service for minor repairs, though in preparation for early return to service.' We also quoted from the *Hooven* Case as follows: 'The test of liability under the Safety Appliance Act must not be confused with the test of liability under the Federal Employers' Liability Act. • • • In actions under the Employers' Liability Act the statutory test is whether the employee of the interstate carrier is himself at the time engaged in interstate commerce; he is deemed to be so employed if he is working upon an 'instrumentality of interstate commerce'; and a car or engine is sometimes deemed to continue to be such instrumentality, even though it is not at the precise time active therein. In actions under the Safety Appliance Act the statutory criterion is whether the car is 'in use' 'on its line,' within the true purpose and scope of the act. The two tests are not synonymous.

"It follows from these rulings that under the facts shown here the engine in question was not in actual use in moving interstate commerce at the time of the plaintiff's injury, but was so far withdrawn from such active use as to make the provisions of the Boiler Inspection Act inapplicable."

Brady v. *Wabash Ry.*, 329 Mo. 1123, 49 S. W. 2d 24, *cert. denied* 287 U. S. 619 (1932), is quoted from at length in the *Harlan* case, just cited. A string of cars had been placed on an interchange track by another railroad, there to be inspected and either accepted or rejected by the Wabash (by whom Brady was employed). Brady's duties were to inspect these cars for safety-appliance defects, and he was injured by reason of a loose grabiron during his inspection of one of them. He based his action solely on the Safety Appliance Act. Since the Wabash, which had not yet accepted the car, was not using it on its line, recovery under the Act was denied.

Compton v. *Southern Pac. Co.*, 70 Cal. App. 2d 267, 161 P. 2d 40 (1945). Plaintiff, a roundhouse machinist, was working on a defective locomotive then in the roundhouse. Plaintiff sustained injury by steam which escaped from a defective check valve into the pump on which he was working, and sought to recover under the Boiler Inspection Act. The accident occurred at about 7:15 A. M., at which time the engine had been called for service at 8 A. M.; the locomotive had a fire in the firebox and steam up in the boiler. The trial court permitted the jury to decide whether at the time of the accident the locomotive was "in use" on defendant's line within the meaning of the Boiler Inspection Act. On appeal, this was held to be error, and a judgment for defendant was directed on the ground that as a matter of law the Act had no application, since at the time of the accident the locomotive was not in use on defendant's line within the meaning of the Boiler Inspection Act. After reviewing the cases cited herein by us, the court said (p. 45):

> "The several federal statutes imposing absolute liability on railway carriers for injuries caused by defective equipment all seem to have been drawn carefully to exclude such absolute liability while the car or engine is removed from actual service, even temporarily, for repairs. * * *
>
> "It will be noted that in not one of the absolute liability sections, except Sec. 4 [providing that it shall be unlawful for an interstate railroad carrier 'to use any car in interstate commerce' not provided with grab irons] does the statute apply to cars or engines simply engaged in interstate commerce. In each section, except Sec. 4, some further limitation appears. In some of the sections it is required, in addition, that the equipment be used in 'moving interstate traffic.' Others use language more comparable to that used in [the Boiler Inspection Act]. But with the exception of Sec. 4, each of the sections in Chapter 1

> of Title 45 U. S. C. A. clearly and without ambiguity indicates that it is to apply only when the car is in use on the line or in moving traffic. This, by necessary implication, excludes such sections when the equipment is removed from the line and placed in a roundhouse for temporary or more serious repairs."

In the case at bar, one of petitioner's duties was to render the locomotive in a condition which would comply with the provisions of the Boiler Inspection Act when it was again placed in use. He is claiming a remedy under the Boiler Inspection Act for the existence of a defect which it was his duty to correct so that the locomotive might conform to the standards imposed by that act.

This dilemma might have been the result of a strict application of the Boiler Inspection Act had Congress not studiously avoided it by limiting its application to locomotives *in use* and *in the active service of such carrier.* Since there is an unqualified duty to maintain locomotives in use in a condition which is not unsafe for those who are required to use them in active service, Congress logically contemplated that a locomotive could only be placed in such a condition of safety by taking it out of use and effecting proper repairs and services.

In *Chicago & N. W. Ry.* v. *United States,* 168 Fed. 236, 238 (8th Cir. 1909), it is said:

> "The object of the safety appliance statutes was manifestly to require interstate carriers to maintain their rolling stock in a certain condition of safety. It could not have been the intention of Congress to impose this duty upon carriers, and at the same time deprive them of the only practical method of meeting its requirements. Rolling stock must necessarily become defective, within the terms of these statutes, both by use and by accident * * *. The only practical method of railroading requires that such vehicles,

when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance acts. A carrier may move one or more cars by themselves to repair shops, for the purpose of having them placed in a condition to conform to the safety appliance acts, without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements."

During the time that equipment is withdrawn from use for servicing or repairs, a carrier's duty is limited to one of ordinary care under the general provisions of the Federal Employers' Liability Act.

Attention is invited to the interesting comments made by the Supreme Court of Utah in *Ehalt* v. *McCarthy*, 104 Utah 110, 138 P. 2d 639, 644 (1943):

"* * * we do not believe that it was within the contemplation of the Boiler Inspection Act to include an engine whose dangerous condition was itself due only to the failure of those charged with operating the engine to so attend to the very fundamental duty of supplying the water needed to run the engine."

and at page 645:

"* * * The carrier has the duty to supervise and inspect and to see that such equipment is not permitted to be used on its line in active service until the potential danger is removed."

and again at page 646:

"* * * A danger created by the non-attention or neglect incident to operation which does not produce an engine defective in itself constitutes the basis for an action, not under the Boiler Inspection Act, but under other sections of Title 45. * * * The danger being one incidental to operation rather than one which becomes

> an attribute of an engine so as to make it unnecessarily perilous to life and limb, as meant by the Boiler Inspection Act, the action would have to be brought under the Federal Employers' Liability Act, * * *."

It is clear that the Boiler Inspection Act has no application to the case now under consideration by this Court, and since petitioner waived all charges of ordinary negligence, we submit that the Court of Appeals was correct in holding that the trial court should have directed a verdict for the respondents.

PETITIONER'S CASES DISTINGUISHED.

Counsel for petitioner have not even attempted to distinguish any of the cases relied on by the Court of Appeals in support of its decision. Those cases clearly are not distinguishable from the one presently at bar. Furthermore, none of the decisions relied on by petitioner supports his position. He has resorted to twisted interpretations of numerous decisions which have no relevancy here, in an obvious attempt to mislead.

The following are the cases relied on by petitioner, and the reasons why they are not in point:

Brady v. *Terminal R. R. Assn.*, 303 U. S. 10 (1938). This Court's statement of facts at page 13 distinguishes that case from this one, for there we learn that "the car had been brought into the yard at Granite City, and placed on a receiving track temporarily pending the continuance of transportation. If not found defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. *It is not a case where a defective car has reached a place of repair.*" (Emphasis added.) The Supreme Court distinguished this case, for the reasons stated, from two of the cases on which we rely: *Baltimore & O. R. R.* v. *Hooven*, 297 Fed. 919; and *New York, C. & St. L. Ry.* v. *Kelly*, 70 F. 2d 548. We submit that the *Brady* case, far from bolstering petitioner's position, is authority for the correct ruling of the court below in the case at bar.

Johnson v. *Southern Pacific Co.*, 196 U. S. 1 (1904). Obviously, this case is not in point, for the dining car had not been withdrawn from service for repairs or servicing. The coupler involved in this suit under the Safety Appliance

Act failed to couple automatically *during a switching operation.*

Louisville & N. Ry. v. *Botts*, 173 F. 2d 164 (8th Cir. 1949). The first sentence of the opinion eliminates this case from consideration, for there we find that the plaintiff, a switchman, was injured when he slipped off a footboard of a moving switch engine as he was attempting to mount it. The accident occurred in the midst of a switching movement [fourth full paragraph, p. 166] in which the defective engine was being used.

O'Donnell v. *Elgin, Joliet & E. Ry.*, ... U. S. ....., 94 L. Ed. 170 (1949). This case also is not apposite, because in it the switchman was injured while engaged in a switching operation. The car or cars involved had not been withdrawn from service. The holding of the Supreme Court in this case was that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke *in the switching operation* was a violation of the Act. The Court certainly did not hold, as petitioner contends, that the mere *ownership* or *loan* of a defective locomotive or car which is not in use violates the Safety Appliance or Boiler Inspection Act.

Lilly v. *Grand Trunk R. R.*, 317 U. S. 481 (1943). Here again the plaintiff, a brakeman, was injured when he fell from the top of a locomotive tender while he was pulling a water spout over the tender's manhole. The opinion of the Supreme Court does not clearly so indicate, but by reference to the opinion below, 312 Ill. App. 73, 76, 37 N. E. 2d 888, it will be seen that the locomotive was engaged in switching operations; that the engine crew was aboard and operating the engine. That was not a case where the locomotive had been withdrawn from use for servicing, and abandoned while that work was in progress.

North Carolina R. R. v. *Zachary*, 232 U. S. 248 (1914).

Counsel state, at page 53 of their brief, that this case involved the Safety Appliance Act. That is not so. Our copy of 232 U. S. indicates that the question involved was whether plaintiff's right to recover was based on the Fellow Servant Act of North Carolina or on the Federal Employers' Liability Act; *i. e.*, whether at the time of the accident the employee, who stepped in front of a *moving switch engine*, was engaged in state or interstate commerce. Since both respondents in this *Lyle* case have admitted the interstate commerce allegations of the complaint, and that phase of the matter is not at issue, we have no idea why counsel cited this case at least three times in their brief.

Chicago, G. W. R. R. v. *Schendel*, 267 U. S. 287 (1925). While the train, upon which decedent was working, was on the main line a drawbar pulled out of a car. Thereupon the crew chained that car to the one immediately ahead. The whole train was then pulled on to a siding with the intention of detaching the damaged car and leaving it there. The decision has no bearing, because it was while in the act of detaching the crippled car from the train that the decedent was injured.

Minneapolis &c. Ry. v. *Goneau*, 269 U. S. 406 (1926). The accident in this case, like the one in *Schendel* just referred to, happened when a brakeman, in an endeavor to couple a train where it had parted between two cars *while en route*, due to a defect in one of the automatic couplings, went between the ends of the cars, lost his balance, and fell from a bridge on which the cars had stopped.

Fort Street Union Depot v. *Hillen*, 119 F. 2d 307 (6th Cir. 1941). The defective club car involved in this suit was one of a number of cars which had composed a Wabash passenger train which had arrived in the station prior to the accident, and was standing on a track in the yards next the one on which plaintiff was riding when he sustained his injury. There is no indication that the club car was

undergoing either repairs or servicing, and the case is not in point.

Erie R. R. v. *Russell,* 183 Fed. 722 (2d Cir. 1910). Here the defective car was standing on a track in the switch yard. The forepart of the opinion, which counsel quote at page 57 of their own brief, shows why the case is not in point:

> "The car with the defective coupler was not withdrawn from use. Although billed to the repair shop, it was not sent there, nor was it sent to any place used especially for making repairs."

Texas & Pacific Ry. v. *Rigsby,* 241 U. S. 33 (1916), and *Great Northern Ry.* v. *Otos,* 239 U. S. 349 (1915), are cited by counsel as being to the same effect as *Erie R. R.* v. *Russell.* In *Rigsby* the accident occurred *during a switching movement* in taking some bad order cars to the shops, there to be repaired. In *Otos,* the plaintiff was a switch foreman injured while breaking up a train "which had come into his state from the west." The third paragraph of the opinion, p. 351, aptly discloses why the case is inapposite here, for it says:

> "* * * [The car] had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car."

CONCLUSION.

In the trial court, at the close of all the evidence, the petitioner concluded that there was insufficient proof to support his allegations of ordinary negligence under the Federal Employers' Liability Act, and therefore withdrew them and submitted his case solely on his allegation of the Boiler Inspection Act violation (Tr. 170, 171). Ac-

cordingly, the trial court gave no instructions dealing with negligence under the Federal Employers' Liability Act, and charged the jury solely as to the alleged violation of the Boiler Inspection Act (Tr. 171). Petitioner did not object to the charge.

The Court of Appeals correctly interpreted the law and applied it to the evidence in this record. Since the locomotive clearly was not in use in active service at the time of the accident, the provisions of the Boiler Inspection Act were not applicable. Obviously, a carrier must occasionally withdraw its locomotives and cars from use so that they may be placed in such condition as will make them conform to the absolute requirements of the Safety Appliance and Boiler Inspection Acts.

The straightforward and well-reasoned opinion of the United States Court of Appeals for the Seventh Circuit (Tr. 181, *et seq.*) is clearly right. That opinion is not in conflict with any other decision on the same matter; neither is it in probable conflict with applicable decisions of this Court. We have cited and quoted from the only ten federal and state opinions which have decided the question. In each of those cases the decision has been in line with the one now under attack, and in six of them certiorari was sought but consistently denied by this Court.

For the reasons set out in this brief, the respondents pray that the writ be denied.

Respectfully submitted,

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